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THE GENERAL STATUTES OF NORTH CAROLINA

JAN 28 1980

1979 CUMULATIVE SUPPLEMENT

Annotated, under the Supervision of the Department of
Justice, by the Editorial Staff of the Publishers

Under the Direction of
D. P. HARRIMAN, S. C. WILLARD AND SYLVIA FAULKNER

Volume 1D

1965 Replacement

Annotated through 297 N.C. 304 and 41 N.C. App. 192. For
complete scope of annotations, see scope of volume page.

**Place in Pocket of Corresponding Volume of Main Set.
This Supersedes Previous Supplement, Which
May Be Retained for Reference Purposes.**

THE MICHIE COMPANY

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Preface

This Cumulative Supplement to Replacement Volume 1D contains the general laws of a permanent nature enacted at the 1966, 1967, 1969, 1971, the First and Second 1973, 1975 and 1977 Sessions and the first 1979 Session of the General Assembly which are within the scope of such volume, and brings to date the annotations included therein. At the First 1973 Session, the General Assembly enacted Session Laws 1973, Chapters 1 to 826. At the Second 1973 Session, which was held in 1974, the General Assembly enacted Session Laws 1973, Chapters 827 to 1482.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show all sections except catchlines carried for the purpose of notes only. An index to all statutes codified herein appears in Replacement Volumes 4B, 4C and 4D.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement, and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1967, 1969, 1971, the First and Second 1973, 1975 and 1977 Sessions and the first 1979 Session of the General Assembly affecting Chapters 21 through 27 of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports through volume 297, p. 304.

North Carolina Court of Appeals Reports through volume 41, p. 192.

Federal Reporter 2nd Series through volume 597, p. 283.

Federal Supplement through volume 469, p. 738.

Federal Rules Decisions through volume 81, p. 262.

United States Reports through volume 438, p. 783.

Supreme Court Reporter through volume 99.

North Carolina Law Review.

Wake Forest Intramural Law Review.

Duke Law Journal.

North Carolina Central Law Journal.

Opinions of the Attorney General.

The General Statutes of North Carolina 1979 Cumulative Supplement

VOLUME 1D

Chapter 22.

Contracts Requiring Writing.

§ 22-1. Contracts charging representative personally; promise to answer for debt of another.

I. IN GENERAL.

Editor's Note. —

For case law survey as to statute of frauds, see 45 N.C.L. Rev. 907, 966 (1967). For note discussing the application of the main purpose rule in the statute of frauds, see 54 N.C.L. Rev. 117 (1975).

Applied in *Howard v. Hamilton*, 28 N.C. App. 670, 222 S.E.2d 913 (1976).

Cited in *Chance v. Jackson*, 17 N.C. App. 638, 195 S.E.2d 321 (1973); *Bowling v. Hines*, 17 N.C. App. 697, 195 S.E.2d 377 (1973).

III. PROMISE TO ANSWER FOR DEBT OF ANOTHER.

A. In General.

Or to Promise Creating Original Obligation. —

In accord with 3rd paragraph in original. See *Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 202 S.E.2d 591 (1974).

There has been carved out an exception to this section where the promisor has such a direct, immediate, pecuniary interest in the subject matter of the principal debtor's contract so as to indicate that the guarantor has intended to adopt the original contract as his own. This exception is known as the "main purpose rule." *Burlington Indus., Inc. v. Foil*, 19 N.C. App. 172, 198 S.E.2d 194 (1973), *aff'd*, 284 N.C. 740, 202 S.E.2d 591 (1974).

North Carolina has long recognized an exception to the statute of frauds, generally referred to as either the "main purpose rule" or the "leading object rule." Generally, if it is concluded that the promisor has the requisite personal, immediate and pecuniary interest in the transaction in which a third party is the primary obligor, then the promise is said to be original rather than collateral and therefore need not be in writing to be binding. *Burlington*

Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974); *McKenzie Supply Co. v. Motel Dev. Unit 2, Inc.*, 32 N.C. App. 199, 231 S.E.2d 201 (1977).

The promise to pay the debt of another is outside this section and enforceable if the promise is supported by an independent and sufficient consideration running to the promisor. This rule is generally referred to as the "main purpose rule" or the "leading object rule." *McKenzie Supply Co. v. Motel Dev. Unit 2, Inc.*, 32 N.C. App. 199, 231 S.E.2d 201 (1977).

What Determines Nature of Promise as Original or Collateral. —

In accord with 2nd paragraph in original. See *Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 202 S.E.2d 591 (1974).

The main purpose rule is applicable when a court has determined that the promisor's answering for the debt or default of another is merely incidental to his broader purposes. He is participating in the principal contract and making its obligation his own. The expected advantage to the promisor must be such as to justify the conclusion that his main purpose in making the promise is to advance his own interests. *Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 202 S.E.2d 591 (1974).

The benefit to be derived from one's ownership of stock or holding the position of an officer or director is too indirect or remote to invoke the application of the main purpose rule. Something more — some other expected benefit or advantage to be gained by making the promise — is required to make the main purpose rule applicable. *Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 202 S.E.2d 591 (1974).

B. Illustrative Cases.

Persons who sign a note with the original makers, the note being complete except for the insertion of the name of the payee, may not contend that their obligation was to answer on a

special promise for the debt of another within the protection of the statute of frauds, since the writing is a sufficient memorandum within the purview of this section. *Jones v. Jones*, 268 N.C. 701, 151 S.E.2d 587 (1966).

Promise of a corporate chairman who was the main stockholder in a school to stand good for the debt of the school to be incurred for the printing of catalogues was not in writing and was within the statute of frauds, but since the

art studio which had contracted in its name for the printing offered evidence to invoke the application of the "main purpose rule," which is a well-known exception to the rule requiring that such promises be evidenced by a written memorandum, the question should have gone to the jury. *Stuart Studio, Inc. v. National School of Heavy Equip., Inc.*, 25 N.C. App. 544, 214 S.E.2d 192 (1975).

§ 22-2. Contract for sale of land; leases.

I. IN GENERAL.

Editor's Note. —

For article on options to purchase real property in North Carolina, see 44 N.C.L. Rev. 63 (1965). For article concerning the quest for clear land titles in North Carolina, see 44 N.C.L. Rev. 89 (1965). For note on the sufficiency of a will as a memorandum for purposes of the statute of frauds, see 54 N.C.L. Rev. 976 (1976).

A deed is a contract which must meet the requirements of the statute of frauds. *Overton v. Boyce*, 26 N.C. App. 680, 217 S.E.2d 704 (1975), rev'd on other grounds, 289 N.C. 291, 221 S.E.2d 347 (1976).

This section has no application to parol trusts. —

State courts have tried to avoid the sometimes harsh results that a strict application of the statute of frauds would bring to unknowing and uneducated persons. It has been avoided on occasion by the application of a parol trust. *Britt v. Allen*, 21 N.C. App. 497, 204 S.E.2d 903 (1974).

Parol trust device is used to prevent a party from retaining property unfairly after purchasing it as the agent for another party. *Britt v. Allen*, 27 N.C. App. 122, 218 S.E.2d 218 (1975), aff'd in part, rev'd in part, 291 N.C. 630, 231 S.E.2d 607 (1977).

This section is applicable to option contracts for the purchase of property. *Craig v. Kessing*, 36 N.C. App. 389, 244 S.E.2d 721 (1978), appeal dismissed, 295 N.C. 549, S.E.2d (1978).

To be specifically enforceable an option-contract must meet the requirements of the statute of frauds. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

Statute Is Not Applicable to Abrogation, etc. —

A lease which is required by the statute of frauds to be in writing may be rescinded orally by the mutual assent of both parties. *Investment Properties of Asheville, Inc. v. Allen*, 281 N.C. 174, 188 S.E.2d 441 (1972), rev'd on other grounds, 283 N.C. 277, 196 S.E.2d 262 (1973).

Even though a contract is one which would terminate at the promisee's death, the promisor may waive this feature of the contract and does so where he permits others, associated with the

promisee in his lifetime in rendering the performance, to continue after his death and accepts such performance without giving notice within a reasonable time of an intention to consider the obligation as ended. *Rape v. Lyerly*, 287 N.C. 601, 215 S.E.2d 737 (1975).

Recovery on Quantum Meruit. — Failure to prove a special contract would not preclude plaintiffs from having their case submitted to the jury if their evidence was sufficient to support a recovery based on quantum meruit. *Hicks v. Hicks*, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

Applied in *Henry v. Shore*, 18 N.C. App. 463, 197 S.E.2d 270 (1973); *Britt v. Allen*, 37 N.C. App. 732, 247 S.E.2d 17 (1978).

Cited in *Bundy v. Ayscue*, 5 N.C. App. 581, 169 S.E.2d 87 (1969); *Cornatzer v. Nicks*, 14 N.C. App. 152, 187 S.E.2d 385 (1972); *Hoots v. Calaway*, 282 N.C. 477, 193 S.E.2d 709 (1973).

II. WHAT CONSTITUTES AN INTEREST IN OR CONCERNING LAND.

An easement, etc. —

An easement is an interest in land and is subject to the statute of frauds. *Prentice v. Roberts*, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

An oral contract to give, etc. —

In accord with 1st paragraph in original. See *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

In accord with 2nd paragraph in original. See *Hicks v. Hicks*, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

In accord with 4th paragraph in original. See *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

Option. — Upon the plea of the statute of frauds by defendant in defense to an action on an option to sell realty, plaintiff may neither enforce the agreement nor recover damages for loss of a bargain. *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

Valid Written Contract to Devise Land Is Enforceable. — Although an oral contract to devise land is unenforceable, a valid written

contract to devise land is enforceable in equity. *Rape v. Lyerly*, 287 N.C. 601, 215 S.E.2d 737 (1975).

An indivisible contract to devise, etc. —

In accord with original. See *Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970); *Hicks v. Hicks*, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

Parol Release, etc. —

An unexecuted verbal agreement, made by a mortgagee for a valuable consideration, to release a real estate mortgage does not come within the statute of frauds. *Nye v. University Dev. Co.*, 10 N.C. App. 676, 179 S.E.2d 795, cert. denied, 278 N.C. 702, 181 S.E.2d 603 (1971).

Negative Easement. —

A negative easement clearly comes within the statute of frauds. *Simmons v. Morton*, 1 N.C. App. 308, 161 S.E.2d 222 (1968).

III. SUFFICIENCY OF COMPLI- ANCE WITH SECTION.

A. In General.

No special form or instrument, etc. —

A memorandum, by its very nature, is an informal instrument, and the statute of frauds does not require that it be in any particular form. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

What the Writing Must Contain. —

In accord with 2nd paragraph in original. See *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

The statute of frauds requires that all essential elements of the contract be reduced to writing. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

Where under all the circumstances the meaning of the writing including the description is clear and certain, it is sufficient to comply with the statute of frauds and bind the parties. *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E.2d 410 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

A check can be a sufficient memorandum, provided it contains expressly or by necessary implication the essential elements of an agreement to sell. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

Essential elements of an agreement to sell include a designation of the vendor, the vendee, the purchase price, and a description of the land, the subject-matter of the contract, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

The agreement must adequately express, etc. —

In accord with 1st paragraph in original. See *Rape v. Lyerly*, 287 N.C. 601, 215 S.E.2d 737 (1975).

In accord with 2nd paragraph in original. See *Rape v. Lyerly*, 287 N.C. 601, 215 S.E.2d 737 (1975).

Writing Must Describe Subject Matter. —

In accord with second paragraph in original. See *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E.2d 410 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

Statement of Time for Performance Not Necessarily Required. — A memorandum of an agreement for the sale of land is not necessarily insufficient to satisfy the requirements of the statute of frauds because the time for performance is not stated therein. In case of an executory contract of sale, where the time for the execution of the conveyance or transfer is not limited, the law implies that it is to be done within a reasonable time, and the failure to incorporate in the memorandum such a statement does not render it insufficient. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

Omission from the memorandum of time of performance is not fatal. Where no time of performance is stated, the law implies that the option must be exercised within a reasonable time. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

There Must Be No Patent Ambiguity. —

In accord with original. See *Prentice v. Roberts*, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

When Patent Ambiguity Exists. —

In accord with original. See *Prentice v. Roberts*, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

When a description in a contract to convey land leaves the land in a state of absolute uncertainty, and refers to nothing extrinsic by which it might be identified with certainty, it is patently ambiguous and parol evidence is not admissible to aid the description. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

When description in contract to convey land is patently ambiguous the deed or contract is void. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

Whether a description in a contract to convey land is patently ambiguous is a question of law. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

Latent Ambiguity in Description. — A description in a contract to convey land is latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

A description is said to be latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made. *Prentice v. Roberts*, 32 N.C. App. 379, 232 S.E.2d

286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

Patent and Latent Ambiguities Compared. — A patent ambiguity raises a question of construction; a latent ambiguity raises a question of identity. *Prentice v. Roberts*, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

If the ambiguity is latent, evidence dehors the contract is both competent and necessary. *Prentice v. Roberts*, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

Sufficiency of Description. —

In accord with 2nd paragraph in original. See *Carlton v. Anderson*, 276 N.C. 564, 173 S.E.2d 783 (1970); *Sheppard v. Andrews*, 7 N.C. App. 517, 173 S.E.2d 67 (1970); *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

In accord with 3rd paragraph in original. See *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

A memorandum is insufficient to meet the requirements of this section where the writing itself does not point to anything except two roads and these roads do not enclose any boundary. *Carlton v. Anderson*, 276 N.C. 564, 173 S.E.2d 783 (1970).

The writings must disclose, at least with sufficient definiteness to be aided by parol, the terms of the contract, the names of the parties, and a description of the property. *Greenberg v. Bailey*, 14 N.C. App. 34, 187 S.E.2d 505 (1972).

The designation of a tract of land by its popular name is sufficient under the statute of frauds to permit the introduction of extrinsic evidence to identify the particular tract intended. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

Statement of Price Not Always Required. — Where the vendor is the party to be charged, the statute of frauds does not require that the price be stated in writing. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

Omission from the memorandum of the manner of payment is not fatal. Where the contract fails to specify the manner and form of payment, the contract is construed to require payment to be made in cash simultaneously with tender or delivery of the deed. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977).

Requisites of Deeds. —

A valid contract to convey land must contain expressly or by necessary implication all the essential features of an agreement to sell, one of which is a description of the land, certain in itself or capable of being rendered certain by reference to an extrinsic source designated therein. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

A contract to sell or convey land, or a memorandum thereof, within the meaning of the statute of frauds, must contain a description of

the land, the subject matter of the contract, which is either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. *Watts v. Ridenhour*, 27 N.C. App. 8, 217 S.E.2d 211 (1975).

A contract to convey a part of a tract of land, to be valid, must definitely identify the portion to be conveyed or designate the means or source by which it can be positively identified. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

A contract to convey, excepting a part of the land described, is valid provided land excepted can be identified. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

A contract to convey 200 acres of a larger described tract is saved from patent ambiguity by the provision that the acreage is "to be determined by a new survey furnished by the sellers." *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

Excepted property in a contract to convey land is described with sufficient certainty if the exact location thereof is left to the election of the grantor or is capable of subsequent ascertainment otherwise. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

Grant of Easement. — No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, provided the language is certain and definite in its terms. The instrument should describe with reasonable certainty the easement created and the dominant and servient tenements. *Prentice v. Roberts*, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

Easement Not Void for Uncertainty of Location. — When the grant does describe with reasonable certainty the easement created and the dominant and servient tenements, but does not definitely locate it, the easement is not held void for uncertainty under the statute of frauds, but instead, the grantee is entitled to a reasonable and convenient way located in the manner and within the limits set forth in the grant. *Prentice v. Roberts*, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

And an easement may be located by the practical location by the grantee, acquiesced in by the grantor. *Prentice v. Roberts*, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

Conveyance of Remainder. — In a contract to convey land, once lands to be retained by the sellers are surveyed and the description of the property obtained, a conveyance, excepting the land to be retained by metes and bounds as shown by the survey, operates as a conveyance of the remainder. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

An agreement conditioned upon a party's obtaining financing was a valid and enforceable contract, supported by consideration. The contract included an implied promise by the party seeking financing to use reasonable effort to procure a loan and to exercise good faith in deciding whether the terms of the loan were satisfactory. *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E.2d 410 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

Parol Acceptance of Option. —

A written option offering to sell, at the election of the optionee, can become binding on the owner by a verbal notice to the owner. *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967), quoting *Burkhead v. Farlow*, 266 N.C. 595, 146 S.E.2d 802 (1966).

Where the vendor offers in writing to sell described realty at a stated price, payable in yearly installments, a verbal acceptance of the offer by the purchaser is sufficient to constitute an option enforceable by the purchaser. *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

Joint Will May Be Sufficient Memorandum of Contract to Devise. — An indivisible contract to devise real and personal property comes within the purview of this section, statute of frauds. But a joint will may itself be a sufficient memorandum of such contract to satisfy the statute of frauds. *Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970).

Will Not Sufficient, etc. —

In accord with 2nd paragraph in original. See *Hicks v. Hicks*, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

Memorandum Sufficient to Devise Property. — Memorandum which designates the property to be devised, identifies the parties, sets forth their respective obligations as consideration for their contract, and is signed by the party to be charged therewith, was sufficient as a memorandum to devise "for the purposes of the statute of frauds." *Rape v. Lyerly*, 287 N.C. 601, 215 S.E.2d 737 (1975).

Joint Will May Be Sufficient. — Under certain circumstances a joint will may itself be a sufficient memorandum of an agreement between the parties to the will to satisfy the statute of frauds. *Hicks v. Hicks*, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

The memorandum need not be contained in a single document, etc. —

In accord with 1st paragraph in original. See *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E.2d 410 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

In accord with 2nd paragraph in original. See *Greenberg v. Bailey*, 14 N.C. App. 34, 187 S.E.2d 505 (1972).

Contract when considered together with a separate sheet of "Attachment" constituted a

memorandum sufficient to satisfy the statute of frauds, where the contract specifically stated that the tract being sold was "more particularly described in Attachment hereof." *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E.2d 410 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

Sufficient Memorandum of Extension Agreement. — See *Hardee's Food Sys., Inc. v. Hicks*, 5 N.C. App. 595, 169 S.E.2d 70 (1969).

B. The Signature.

What Constitutes Signing. —

The signing of a paper writing or instrument is the affixing of one's name thereto, with the purpose or intent to identify the paper or instrument, or to give it effect as one's act. This is usually accomplished when a person affixes his name in his own handwriting, in such case the very act clearly evidencing the intent of the signer. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

A writing or memorandum is "signed" in accordance with the statute of frauds if it is signed by the person to be charged by any of the known modes of impressing a name on paper, namely, by writing, printing, lithographing, or other such mode, provided the same is done with the intention of signing. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

The signature to a memorandum under the statute of frauds may be written or printed and need not be subscribed at the foot of the memorandum, but must be made or adopted with the declared or apparent intent of authenticating the memorandum as that of the signer. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

Affixing one's handwritten signature is not the only method by which a paper writing may be considered as being signed within the meaning of the statute of frauds. It has been recognized that a printed name may constitute a sufficient signing under the statute of frauds, provided that it is recognized by the party sought to be charged. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

Signature of Agent. —

In accord with 1st paragraph in original. See *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973).

The writing required by the statute of frauds may be signed by an agent, and the agent's authority to do so need not be in writing. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

The owner of real estate may sell such property through an agent, and when so acting the owner is not required to sign the agreement or to communicate with the purchaser. *Reichler v. Tillman*, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

The agent may sign the contract to sell and convey in his own name or in the name of his principal or principals. *Reichler v. Tillman*, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

The authority of a duly authorized agent to contract to convey lands need not be in writing under the statute of frauds. *Reichler v. Tillman*, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

The authority of an agent to sell the lands of another may be shown aliunde or by parol. *Reichler v. Tillman*, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

The owner of land may sell this land through an agent and the agent may sign a contract to sell and convey in his own name or in the name of his principal(s). *Hayman v. Ross*, 22 N.C. App. 624, 207 S.E.2d 348 (1974).

When Broker May Sign for Both Parties. — Ordinarily, a broker does not act in a dual capacity as the representative of both sides to a negotiation, but only as the agent of the party who first employed him. Once a deal is concluded, however, the law permits him to act as the representative of both parties if they assent thereto, for the purpose of signing a memorandum sufficient to take the transaction out of the statute of frauds. *Hayman v. Ross*, 22 N.C. App. 624, 207 S.E.2d 348 (1974).

A subsequent ratification of an unauthorized signing will make it valid within this section. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973).

Telegrams. — A telegram to which the vendor's name has been affixed in print may be considered as having been signed by the vendor within the meaning of the statute of frauds. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

V. PLEADING AND PRACTICE.

Three Modes, etc. —

The contract, as alleged, may be denied and the statute pleaded, and in such case if it develops on the trial that the contract is in parol, it must be declared invalid. *Simmons v. Morton*, 1 N.C. App. 308, 161 S.E.2d 222 (1968).

Statute May Be Relied on under General Issue, etc. —

Defendant's general denial of the alleged contract invoked the statute of frauds as effectively as if it had been expressly pleaded and thereby imposed upon plaintiff the burden of showing a written contract sufficient to comply with its requirements. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

Parol Evidence Competent When Description Latently Ambiguous. — Where a

description is latently ambiguous plaintiff may offer evidence, parol and other, with reference to extrinsic matter tending to identify the property, and defendant may offer such evidence with reference thereto tending to show impossibility of identification, i.e., ambiguity. *Prentice v. Roberts*, 32 N.C. App. 379, 232 S.E.2d 286, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

Defendant's failure to object, etc. —

In accord with 2nd paragraph in original. See *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

Defendant's failure to object to testimony as to an oral contract does not waive the defense of the statute. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970).

Evidence to Show Husband's Authority to Act as Wife's Agent. — Where plaintiffs alleged and defendants denied that plaintiff entered into a binding contract with both defendants, plaintiffs were free to offer such evidence as they might have to show that the husband-defendant was authorized by his wife to act as her agent to contract to sell the lands belonging to both as tenants by the entirety. There was no necessity that plaintiffs allege that the contract was executed by the feme defendant through an agent. *Reichler v. Tillman*, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

Variance. — Where plaintiff's attempted proof constituted an essential variance and departure from the terms of the written memorandum, he was not entitled to specific performance or damages in the face of defendant's plea of the statute of frauds. *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 152 S.E.2d 85 (1967).

Review. — In a suit for specific performance of a contract for the sale of land, where the federal district court found that the plaintiff failed to show and establish any contract, memorandum or note signed by or on behalf of the seller sufficient to repel his plea of the statute of frauds, unless the district court's findings of fact were clearly erroneous, the court of appeals must accept them. In the instant case, the district court's findings were amply supported by the record. *Darden v. Houtz*, 353 F.2d 369 (4th Cir. 1965).

Chapter 22A.

Signatures.

Sec.
22A-1. Use of a signature facsimile by a visually handicapped person.

§ 22A-1. Use of a signature facsimile by a visually handicapped person. — A visually handicapped person, as defined in G.S. 111-11, may use a registered signature facsimile as a proper mark of his legal signature. An example of the signature facsimile shall be registered by the visually handicapped person with the clerk of the superior court in the county of his domicile. The registered signature facsimile may be revoked at any time in writing by the visually handicapped person. (1973, c. 878.)

Chapter 22B.

Contracts Against Public Policy.

Article 1.

Construction Indemnity Agreements Invalid.

Sec.

22B-1. Construction indemnity agreements
invalid.

ARTICLE 1.

Construction Indemnity Agreements Invalid.

§ 22B-1. Construction indemnity agreements invalid. — Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable. Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees. This section shall not affect an insurance contract, workmen's compensation, or any other agreement issued by an insurer, nor shall this section apply to promises or agreements under which a public utility as defined in G.S. 62-3(23) including a railroad corporation as an indemnitee. This section shall not apply to contracts entered into by the Department of Transportation pursuant to G.S. 136-28.1. (1979, c. 597, s. 1.)

Editor's Note. — Session Laws 1979, c. 597, s. 2 provides: "This act shall become effective July 1, 1979, and shall apply to contracts signed on or after the effective date."

Under § 97-1.1, any reference in any act to "workmen's compensation" shall be deemed to refer to "workers' compensation."

Chapter 23.

Debtor and Creditor.

Article 3.

Trustee for Estate of Debtor Imprisoned for Crime.

Sec.

23-18. Persons who may apply for trustee for imprisoned debtor.

Article 4.

Discharge of Insolvent Debtors.

23-25. Petition; before whom; notice; service.

23-26. Warrant issued for prisoner.

23-27. Proceeding on application.

Sec.

23-29. Persons taken in arrest and bail proceedings, or in execution.

23-30.1. Provisional release.

23-34. Where no suggestion of fraud, discharge granted.

Article 5.

General Provisions under Articles 2, 3 and 4.

23-39. Superior or district court tries issue of fraud.

ARTICLE 1.

*Assignments for Benefit of Creditors.***§ 23-1. Debts mature on execution of assignment; no preferences.**

The relief afforded by this section is statutory and does not arise out of common law. *Wilson v. Crab Orchard Dev. Co.*, 5 N.C. App. 600, 169 S.E.2d 50 (1969), *aff'd*, 276 N.C. 198, 171 S.E.2d 873 (1970).

This section does not define an assignment for benefit of creditors, but merely forbids a preference in such assignment. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

What Constitutes an Assignment. —

In accord with original. See *Edwards v. Northwestern Bank*, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

A general assignment for the benefit of creditors is ordinarily a conveyance by a debtor without consideration from the grantee of substantially all his property in trust to collect the amount owing to him, to sell and convey the property, to distribute the proceeds of all the property among his creditors, and to return the surplus, if any, to the debtor. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

Same — Mortgage. —

A mortgage, given by an insolvent person upon substantially all of his property to secure a preexisting debt so as to prefer the beneficiary of the mortgage over his other creditors, is void as a preferential assignment for the benefit of creditors forbidden by this section. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

A voluntary and preferential deed of trust is also within the condemnation of this section.

Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 171 S.E.2d 873 (1970).

“Voluntary” Defined. — “Voluntary” has been defined as “without consideration.” *Wilson v. Crab Orchard Dev. Co.*, 5 N.C. App. 600, 169 S.E.2d 50 (1969), *aff'd*, 276 N.C. 198, 171 S.E.2d 873 (1970).

Validity of Preferential Transfer by Insolvent Debtor. — Apart from the provisions of § 23-1 and § 23-2 a transfer, admittedly preferential, by a debtor admittedly insolvent, is not unlawful or subject to attack on that ground. *Estridge v. Denson*, 270 N.C. 556, 155 S.E.2d 190 (1967).

It is not unlawful for an insolvent debtor to transfer his property in exchange for other property of a different form. *Estridge v. Denson*, 270 N.C. 556, 155 S.E.2d 190 (1967).

Transfer to Corporation in Exchange for Stock. — A transfer of property by an insolvent debtor to a corporation newly formed for the purpose of satisfying creditors, in exchange for shares of stock in that corporation is a transfer for value, at least where it appears that shares were issued to other stockholders for cash, and the transfer is not an unlawful or invalid assignment. *Estridge v. Denson*, 270 N.C. 556, 155 S.E.2d 190 (1967).

Where defendant assigns his rights in certain certificates of deposit to a corporate defendant and in return for these certificates the corporate defendant assigns all shares of its corporate stock to the defendant to be used by him in satisfying his creditors, the transfer to the corporate defendant is for a valuable

consideration and is, therefore, not an assignment for the benefit of creditors as envisioned by this section. *Wilson v. Crab Orchard Dev. Co.*, 5 N.C. App. 600, 169 S.E.2d 50 (1969), *aff'd*, 276 N.C. 198, 171 S.E.2d 873 (1970).

Statute of Limitations. — The three-year statute of limitation applies to a creditor's action for relief under this section. *Wilson v. Crab Orchard Dev. Co.*, 5 N.C. App. 600, 169 S.E.2d 50

(1969), *aff'd*, 276 N.C. 198, 171 S.E.2d 873 (1970).

Accrual of Cause of Actions. — The cause of action under this section accrues at the time of the assignments and the statutory period begins to run at that time. *Wilson v. Crab Orchard Dev. Co.*, 5 N.C. App. 600, 169 S.E.2d 50 (1969), *aff'd*, 276 N.C. 198, 171 S.E.2d 873 (1970).

Cited in *Estridge v. Crab Orchard Dev. Co.*, 5 N.C. App. 604, 169 S.E.2d 53 (1969).

§ 23-2. Trustee to file schedule of property.

Validity of Preferential Transfer by Insolvent Debtor. — Apart from the provisions of § 23-1 and § 23-2 a transfer, admittedly preferential, by a debtor admittedly insolvent, is

not unlawful or subject to attack on that ground. *Estridge v. Denson*, 270 N.C. 556, 155 S.E.2d 190 (1967).

§ 23-3. Trustee to recover property conveyed fraudulently or in preference.

Applied in *Edwards v. Northwestern Bank*, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

ARTICLE 3.

Trustee for Estate of Debtor Imprisoned for Crime.

§ 23-18. Persons who may apply for trustee for imprisoned debtor. — When any debtor is imprisoned in the penitentiary for any term, or in a county jail for any term more than 12 months, application by petition may be made by any creditor, the debtor, or by his or her spouse, or any of his or her relatives, for the appointment of a trustee to take charge of the estate of such debtor. (1868-9, c. 162, s. 40; Code, s. 2974; Rev., s. 1943; C. S., s. 1626; 1977, c. 549.)

Editor's Note. — The 1977 amendment substituted "his or her spouse, or any of his or her" for "his wife, or any of his."

ARTICLE 4.

Discharge of Insolvent Debtors.

§ 23-23. Insolvent debtor's oath.

Cited in *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

§ 23-24. Persons imprisoned for nonpayment of costs in criminal cases.

Editor's Note. — For note on imprisonment of an indigent at low per diem rate for failure to pay fine, see 6 Wake Forest Intra. L. Rev. 509 (1970).

Imprisonment Beyond Statutory Maximum for Inability to Pay Fine Is Unconstitutional.

A state may not constitutionally imprison beyond the maximum duration fixed by statute

a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

Nor Can Inability to Pay Court Costs Justify Such Imprisonment. — Inability to pay court costs cannot justify imprisoning an indigent beyond the maximum statutory term since the equal protection clause prohibits expanding the maximum term specified by the statute simply because of inability to pay. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

The holding regarding imprisonment for involuntary nonpayment of fines applies with equal force to imprisonment for involuntary nonpayment of court costs. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

Since Equal Protection Requires That Statutory Ceiling on Imprisonment Be Same for All Defendants. — The equal protection clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

Once the state has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum

solely by reason of their indigency. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

And Discrimination Resting on Ability to Pay Is Impermissible. — When the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs, there is an impermissible discrimination that rests on ability to pay. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

But Imprisonment for Willful Refusal to Pay Not Precluded. — Nothing in this decision precludes imprisonment for willful refusal to pay a fine or court costs. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

Nor Is Imposition of Maximum Penalty on Indigent. — Nothing in this holding precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

Or Confinement for Nonpayment of Fine as Alternative. — This holding does not deal with a judgment of confinement for nonpayment of a fine in the familiar pattern of alternative sentence of "\$30 or 30 days." *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

Mere fact that an indigent may be imprisoned longer than a nonindigent convicted of the same offense does not give rise to a violation of the equal protection clause. *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

§ 23-25. Petition; before whom; notice; service. — Every such person, having remained in prison for 20 days, may apply by petition to the court where the judgment against him was entered, praying to be brought before such court at a time and place to be named in the petition, and to be discharged upon taking the oath hereinbefore prescribed. The applicant shall cause 10 days' notice of the time and place of filing the petition to be served on the sheriff or other officer by whom he was committed. In cases of conviction before a magistrate the clerk of the superior court of the county where the convicted person confined for costs is, may administer the oath and discharge the prisoner. (1773, c. 100, s. 1, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, ss. 27, 28; 1873-4, c. 90; 1874-5, c. 11; Code, ss. 2968, 2969; 1891, c. 195; Rev., s. 1916; C. S., s. 1633; 1971, c. 1190, s. 1.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate" for "justice of the peace" in the third sentence.

§ 23-26. Warrant issued for prisoner. — The clerk of the superior court before whom such petition is presented shall forthwith issue a warrant to the sheriff, or keeper of the prison, requiring him to bring the prisoner before the court, at the time and place named for the hearing of the case, which warrant

every such sheriff or keeper shall obey. (1773, c. 100, s. 1, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, s. 29; Code, s. 2970; Rev., s. 1917; C. S., s. 1634; 1971, c. 1190, s. 2.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "or justice of the peace" following "superior court."

§ 23-27. Proceeding on application. — At the hearing of the petition, if the prisoner has no visible estate, and takes and subscribes the oath or affirmation prescribed in this Article, the clerk of the superior court before whom he is brought, shall administer the oath or affirmation to him, and discharge him from imprisonment, of which an entry shall be made in the docket of the court. (1773, c. 100, s. 1, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, s. 30; Code, s. 2971; Rev., s. 1918; C. S., s. 1635; 1971, c. 1190, s. 3.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "or justice of the peace" following "superior court," and deleted "and, where the proceeding is before a justice of

the peace, the justice shall return the petition and orders thereon into the office of the clerk of the superior court to be filed" at the end of the section.

§ 23-29. Persons taken in arrest and bail proceedings, or in execution. — The following persons also are entitled to the benefit of this article as hereinafter provided:

- (1) Every person taken or charged on any order of arrest for default of bail, or on surrender of bail in any action.
- (2) Every person taken or charged in execution of arrest for any debt or damages rendered in any action whatever. (1868-9, c. 162, s. 10; Code, s. 2951; Rev., s. 1920; C. S., s. 1637; 1967, c. 24, s. 5.)

Editor's Note. —

The 1967 amendment, originally effective Oct. 1, 1967, corrected an error by substituting "of" for "or" in subdivision (1). Session Laws 1967, c.

1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

Cited in *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C. 1977).

§ 23-30.1. Provisional release. — Every person who has filed a petition under the provisions of G.S. 23-30 shall be brought before a judge within 72 hours after filing the petition and shall be provisionally released from imprisonment unless a hearing shall be held and the creditor shall establish that the prisoner has fraudulently concealed assets. If, at the time he is brought before a judge, the prisoner makes a showing of indigency, the judge shall appoint counsel for him. A provisional release under this section shall not constitute a discharge of the debtor, and the creditor may oppose the discharge by suggesting fraud even if he has unsuccessfully attempted to oppose the provisional release on the basis of fraudulent concealment. The debtor may be provisionally released even though actual service upon the creditor has not been accomplished if 72 hours has passed since the debtor delivered the notice to the sheriff for service upon the creditor. (1977, c. 649, s. 5.)

Editor's Note. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

§ 23-32. Notice; length of notice and to whom given.

Constitutionality. — The 20-day notice requirement of this section is constitutionally deficient and may not be enforced. *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C.), *aff'd*, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

This section postpones unconscionably and unconstitutionally, as a violation of procedural due process, the right of one imprisoned to have

his day in court. *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C.), *aff'd*, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

Reasonable notice to be required pending legislative correction of constitutional infirmity. — See *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C.), *aff'd*, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

§ 23-34. Where no suggestion of fraud, discharge granted. — If no creditor suggests fraud or opposes the discharge of the debtor, the clerk of the superior court before whom the petition is heard shall forthwith discharge the debtor, and, if he surrenders any estate for the benefit of his creditors, shall appoint a trustee of such estate. The order of discharge and appointment shall be entered in the docket of the court. (1773, c. 100, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, s. 16; Code, s. 2957; Rev., s. 1925; C. S., s. 1642; 1971, c. 1190, s. 4.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "the justice of the peace or" preceding "the clerk of the superior court," and deleted "and if granted by a justice of the peace a copy thereof shall be certified by

him to the clerk of the superior court, where the same shall be recorded, and filed" at the end of the section.

Applied in *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C. 1977).

§ 23-36. Where fraud in issue, discharge only after trial.

Applied in *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C. 1977).

§ 23-37. If fraud found, debtor imprisoned.

Applied in *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C. 1977).

§ 23-38. Effect of order of discharge.

Discharge under section distinguished from release under § 23-32. — See *Grimes v. Miller*,

429 F. Supp. 1350 (M.D.N.C.), *aff'd*, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

ARTICLE 5.

General Provisions under Articles 2, 3, and 4.

§ 23-39. Superior or district court tries issue of fraud. — In every case where an issue of fraud is made up as provided in this Chapter, the case shall be entered in the trial docket of the superior or district court, and stand for trial as other causes; and upon a finding by the jury in favor of the petitioner the judge shall discharge the debtor; if the finding is against the petitioner he shall be committed to jail until he makes full disclosure. (1868-9, c. 162, s. 8; Code, s. 2949; Rev., s. 1935; C. S., s. 1647; 1971, c. 1190, s. 5.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, inserted "or district" near the middle of the section.

§ 23-32. Notice length of notice and requirement of the return a return may be returned and may not be returned. U.S. 278 22 S. Ct. 600 21 L. Ed. 2d 422 (1977). This section purports to be procedurally unconstitutional as a violation of procedural due process, the right of one indicted to have

out if nothing set to ground and it is suggested that the return be returned. U.S. 278 22 S. Ct. 600 21 L. Ed. 2d 422 (1977). This section purports to be procedurally unconstitutional as a violation of procedural due process, the right of one indicted to have out if nothing set to ground and it is suggested that the return be returned. U.S. 278 22 S. Ct. 600 21 L. Ed. 2d 422 (1977). This section purports to be procedurally unconstitutional as a violation of procedural due process, the right of one indicted to have

§ 23-33. Where found in favor of discharge only after trial. U.S. 278 22 S. Ct. 600 21 L. Ed. 2d 422 (1977). This section purports to be procedurally unconstitutional as a violation of procedural due process, the right of one indicted to have

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Chapter 24.

Interest.

Article 1.

General Provisions.

Sec.

24-1.1. Contract rates.

24-1.1A. Contract rates on home loans secured by first mortgages or first deeds of trust.

24-1.1B. [Repealed.]

24-1.2. Installment rates.

24-1.3. Legal rate of interest payable by cooperative marketing associations.

24-2. Penalty for usury; corporate bonds may be sold below par.

24-2.1. Transactions governed by Chapter.

24-4. Obligations due guardians to bear compound interest; rate of interest.

24-8. Loans not in excess of \$300,000; what interest, fees and charges permitted.

Sec.

24-9. Loans to corporations organized for profit not subject to claim or defense of usury.

24-10. Maximum fees on loans secured by real property.

24-11. Certain revolving credit charges.

Article 2.

Loans Secured by Secondary or Junior Mortgages.

24-12. Applicability of Article.

24-13. Principal amount defined.

24-14. Limitations on charges and interest.

24-15. Rebates and late charges.

24-16. Itemized closing statements.

24-16.1. Loans exempt from §§ 24-12 to 24-17.

24-17. Misdemeanors.

ARTICLE 1.

General Provisions.

§ 24-1. Legal rate is six percent.

Editor's Note. —

Session Laws 1971, c. 1229, s. 2, effective July 1, 1971, designated §§ 24-1 through 24-11 as Article 1.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Absent an agreement between parties, six percent per annum is the rate due on money owed under a contract. Hardy-Latham v. Wellons, 415 F.2d 674 (4th Cir. 1968).

In the absence of an agreement, the injured party in cases involving breach of contract is

entitled to interest at the legal rate of six percent. Interstate Equip. Co. v. Smith, 292 N.C. 592, 234 S.E.2d 599 (1977).

And no discretion is vested in the court to determine what shall be the rate of interest in a given case. Hardy-Latham v. Wellons, 415 F.2d 674 (4th Cir. 1968).

Applied in Henderson v. Security Mtg. & Fin. Co., 273 N.C. 253, 160 S.E.2d 39 (1968); United States v. Wachovia Corp., 313 F. Supp. 632 (W.D.N.C. 1970); Cordaro v. Singleton, 31 N.C. App. 476, 229 S.E.2d 707 (1976).

§ 24-1.1. Contract rates. — Except as otherwise provided in this Chapter or other applicable law, the parties to a loan, purchase money loan, advance, commitment for a loan or forbearance may contract in writing for the payment of interest not in excess of:

- (1) Twelve percent (12%) per annum where the principal amount is twenty-five thousand dollars (\$25,000) or less; or
- (2) Any rate agreed upon by the parties where the principal amount is more than twenty-five thousand dollars (\$25,000).

As used in this section, interest shall not be deemed in excess of the rates provided where interest is computed monthly on the outstanding principal balance and is collected not more than 31 days in advance of its due date. Nothing in this section shall be construed to authorize the charging of interest on

committed funds prior to the disbursement of said funds. (1969, c. 1303, s. 1; 1977, c. 778, ss. 1, 3; c. 779, s. 1; 1979, c. 138, s. 1.)

Cross Reference. — For permissible late payment charges, see § 24-10.

Editor's Note. — Session Laws 1969, c. 1303, s. 27, provides: "This act shall be in full force and effect upon ratification; provided, this act shall not affect pending litigation, nor shall the provisions of this act apply to any loan made prior to the effective date of this act." The act was ratified July 2, 1969.

The first 1977 amendment inserted "commitment for a loan" in the introductory language of the first sentence and in the second sentence and added the last sentence.

The second 1977 amendment substituted "one hundred thousand dollars (\$100,000) or less" for "more than fifty thousand dollars (\$50,000.00) but not more than one hundred thousand dollars (\$100,000.00)" in subdivision (2). Session Laws 1977, c. 779, s. 3, provides: "This act shall apply only to loans or loan commitments made after

the effective date of this act." The act was ratified June 28, 1977.

The 1979 amendment rewrote this section.

Session Laws 1977, c. 779, s. 4, contains a severability clause.

For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

Forbearance Agreement Held Not Usurious.

— A forbearance agreement secured by a second deed of trust and executed after the effective date of subdivision former (3) was not usurious in providing for interest of 9% per annum, notwithstanding the note to which the forbearance agreement related was executed prior to the effective date of that subdivision and at a time when the maximum rate of interest was 6%. *Ausband v. Wachovia Bank & Trust Co.*, 17 N.C. App. 325, 194 S.E.2d 160, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973).

§ 24-1.1A. Contract rates on home loans secured by first mortgages or first deeds of trust. — (a) Notwithstanding any other provision of this Chapter, parties to a home loan may contract in writing as follows:

- (1) Where the principal amount is ten thousand dollars (\$10,000) or more the parties may contract for the payment of interest as agreed upon by the parties;
- (2) Where the principal amount is less than ten thousand dollars (\$10,000) the parties may contract for the payment of interest as agreed upon by the parties, if the lender is either (i) approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, a national mortgage association or any federal agency; or (ii) a local or foreign bank, savings and loan association or service corporation wholly owned by one or more savings and loan associations and permitted by law to make home loans, credit union or insurance company; or (iii) a State or federal agency;
- (3) Where the principal amount is less than ten thousand dollars (\$10,000) and the lender is not a lender described in the preceding subdivision (2) the parties may contract for the payment of interest not in excess of ten percent (10%) per annum.
 - (b) No prepayment fees shall be contracted by the borrower and lender with respect to any home loan where the principal amount borrowed is one hundred thousand dollars (\$100,000) or less; otherwise a lender and a borrower may agree on any terms as to the prepayment of a home loan.
 - (c) Except as limited by subsection (b) above, a lender may charge to the borrower the fees described in G.S. 24-10.
 - (d) The loans or investments regulated by G.S. 53-45 shall not be subject to the provisions of this section.
 - (e) The term "home loan" shall mean a loan where the principal amount is less than three hundred thousand dollars (\$300,000) secured by a first mortgage or first deed of trust on real estate upon which there is located or there is to be located one or more single-family dwellings or dwelling units.

(f) Any home loan obligation existing before June 13, 1977, shall be construed with regard to the law existing at the time the home loan or commitment to lend was made and this act shall only apply to home loans or loan commitments made from and after June 13, 1977; provided, however, that variable rate home loan obligations executed prior to April 3, 1974, which by their terms provide that the interest rate shall be decreased and may be increased in accordance with a stated cost of money formula or other index shall be enforceable according to the terms and tenor of said written obligations.

(g) The parties to a home loan governed by G.S. 24-1.1A(a) (1) or (2) may contract in writing to defer payments of interest and for payment of interest on deferred interest as agreed upon by the parties. The parties may agree in writing that said deferred interest may be added to the principal balance of the loan. This subsection shall not be construed to limit payment of interest upon interest in connection with other types of loans.

(h) The parties to a home loan governed by G.S. 24-1.1A(a) (1) or (2) may agree in writing to a mortgage or deed of trust which provides that periodic payments may be graduated during parts of or over the entire term of the loan. The parties to such a loan may also agree in writing to a mortgage or deed of trust which provides that periodic disbursements of part of the loan proceeds may be made by the lender over a period of time agreed upon by the parties, or over a period of time agreed upon by the parties ending with the death of the borrower(s). Such mortgages or deeds of trust may include provisions for adding deferred interest to principal or otherwise providing for charging of interest on deferred interest as agreed upon by the parties. This subsection shall not be construed to limit other types of mortgages or deeds of trust or methods or plans of disbursement or repayment of loans that may be agreed upon by the parties. (1973, c. 1119, ss. 1, 2; 1975, c. 260, s. 1; 1977, c. 542, ss. 1, 2; 1979, c. 362.)

Cross Reference. — For permissible late payment charges, see § 24-10.

Editor's Note. — The 1975 amendment rewrote the section.

The 1979 amendment added subsections (g) and (h).

Session Laws 1977, c. 542, repealed the original section and the 1975 amendatory act and enacted a new § 24-1.1A to read as set out above.

Session Laws 1973, c. 1119, s. 4, provides: "This act shall become effective upon ratification and shall expire on June 30, 1975. Any real estate obligation existing before the effective date of this act shall be construed with regard to interest rates pursuant to the laws existing prior to the effective date of this act and this act shall only apply to loans or loan commitments made after the effective date of this act." The act was ratified April 3, 1974.

Session Laws 1975, c. 260, ss. 2 and 4, provide:

"Sec. 2. Any real estate obligation existing before the effective date of this act shall be construed with regard to interest rates pursuant to the laws existing prior to April 3, 1974, and this act shall only apply to loans or loan commitments made after the effective date of this act.

"Sec. 4. This act shall become effective upon ratification and shall expire on June 30, 1977." The act was ratified May 12, 1975.

Session Laws 1973, c. 1119, s. 3, Session Laws 1975, c. 260, s. 3, and Session Laws 1977, c. 542, s. 3, contain a severability clause.

For a note on the operation of a due-on-sale clause in a deed of trust to allow a lender to exact higher interest rates from the grantee of a mortgagor, see 13 Wake Forest L. Rev. 490 (1977).

§ 24-1.1B: Repealed by Session Laws 1979, c. 335.

§ 24-1.2. Installment rates. — Except as otherwise provided in this Chapter or other applicable law, the parties to a loan, purchase money loan, advance, commitment for a loan, or forbearance, may contract in writing for the payment of interest not in excess of:

- (1) On installment loans which shall not be for periods of less than six months nor for more than 120 months and which are repayable in substantially equal consecutive monthly payments, the parties to a loan

may contract in writing for payment of rates of interest which shall not be collected in advance and which shall be computed monthly on the outstanding principal balance, on loans having an original amount of five thousand dollars (\$5,000) or less and which shall not be secured in any manner or to any degree by real property, an interest rate of fifteen percent (15%) per annum; provided, a minimum charge of ten dollars (\$10.00) or one dollar (\$1.00) per payment may be agreed to and charged in lieu of interest. The borrower may prepay all or any part of the loan without penalty. The due date of the first monthly payment shall not be more than 45 days following the disbursement of funds under any such installment loan.

- (2) On installment loans not exceeding twenty-five thousand dollars (\$25,000) not secured by a first security instrument on real property, payable at least quarterly in substantially equal payments of principal and interest, or substantially equal payments of principal, upon a written agreement signed by the parties, the rate of interest shall not exceed twelve percent (12%) per annum computed on the outstanding balance, provided a minimum charge of ten dollars (\$10.00) or one dollar (\$1.00) per payment may be agreed to and charged in lieu of interest. The borrower may prepay all or any part of the loan without penalty. No lender or lending agent which holds or makes a loan secured by a first security instrument on real property shall make within the first year from the date of the making of the loan secured by the first security instrument a loan secured by a subordinate security instrument on the same property which shall exceed twenty percent (20%) of the original amount of the loan secured by the first security instrument on such real property. Under the provisions of this subsection, a first security instrument is a first mortgage or first deed of trust on real property securing a loan payable in equal installments of principal and interest or equal installments of principal over a period of at least one year, such installments to have been paid at least annually. The maturity date of loans made under this section shall not be less than one year from the date of the advance.
- (3), (4) Repealed by Session Laws 1979, c. 138, s. 3.
- (5) Nothing in this section shall be construed to authorize the charging of interest on committed funds prior to the disbursement of said funds. (1969, c. 1303, s. 2; 1971, c. 448; c. 1122, ss. 1, 2; c. 1165; 1977, c. 778, ss. 2, 4; 1979, c. 138, ss. 2, 3.)

Editor's Note. — Session Laws 1969, c. 1303, s. 27, provides: "This act shall be in full force and effect upon ratification; provided, this act shall not affect pending litigation, nor shall the provisions of this act apply to any loan made prior to the effective date of this act." The act was ratified July 2, 1969.

The first 1971 amendment substituted, "For the purposes of the preceding sentence" for "Under the provisions of this section" at the beginning of the fourth sentence in former subsection (b) (now subdivision (2)).

The second 1971 amendment added former subsections (c) and (d) (now subdivisions (3) and (4)).

The third 1971 amendment substituted "Under the provisions of this subsection" for "For the purposes of the preceding sentence" in the fourth sentence of former subsection (b)

(now subdivision (2)) as amended by the first 1971 act and substituted "one year" for "10 years" in the same sentence.

The 1977 amendment added the introductory language and present subdivision (5), which was designated subsection (e) in the amendatory act. In view of the introductory language, the editors have redesignated all of the subsections as subdivisions.

The 1979 amendment substituted "twenty-five thousand dollars (\$25,000)" for "three hundred thousand dollars (\$300,000)" near the beginning of the first sentence of subdivision (2) and repealed subdivisions (3) and (4). Subdivision (3) provided for a maximum interest rate of 10% on installment loans of \$50,000 or less secured by a first mortgage or deed of trust on real property, not used as the principal residence of the borrower, repayable within 2 to 10 years in

quarterly installments and for prepayment at any time without penalty. Subdivision (4) provided a similar interest rate, on installment loans similarly secured, where the principal was \$7,500 or less, and repayment was to be monthly

over a period of 1 to 10 years, and contained an identical provision as to prepayment.

Opinions of Attorney General. — Mr. Frank L. Harrelson, Commissioner of Banks, 40 N.C.A.G. 54 (1969).

§ 24-1.3. Legal rate of interest payable by cooperative marketing associations. — Unless a greater rate of interest is allowed by this Chapter, the legal rate of interest payable by cooperative marketing associations shall not exceed ten percent (10%) per annum. (1975, c. 822.)

§ 24-2. Penalty for usury; corporate bonds may be sold below par. — The taking, receiving, reserving or charging a greater rate of interest than permitted by this chapter or other applicable law, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid, may recover back twice the amount of interest paid in an action in the nature of action for debt. In any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it is lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest. If security has been given for an usurious loan and the debtor or other person having an interest in the security seeks relief against the enforcement of the security or seeks any other affirmative relief, the debtor or other person having an interest in the security shall not be required to pay or to offer to pay the principal plus legal interest as a condition to obtaining the relief sought but shall be entitled to the advantages provided in this section. Nothing contained in this section or in § 24-1, however, shall be held or construed to prohibit private corporations from paying a commission on or for the sale of their coupon bonds, nor from selling such bonds for less than the par value thereof. (1876-7, c. 91; Code, s. 3836; 1895, c. 69; 1903, c. 154; Rev., s. 1951; C. S., s. 2306; 1955, c. 1196; 1959, c. 110; 1969, c. 1303, s. 3.)

I. GENERAL CONSIDERATION.

Editor's Note. —

The 1969 amendment substituted "permitted by this chapter or other applicable law" for "six per centum per annum" near the beginning of the first sentence and deleted, at the end of the section, a provision relating to installment loans to private corporations. Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

Michigan Nat'l Bank v. Hanner, 268 N.C. 668, 151 S.E.2d 579 (1966), cited in the note below, was commented on in 45 N.C.L. Rev. 899, 1151 (1967).

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

For comment on equity participation (a device to circumvent usury laws) in real estate finance, see 7 N.C. Cent. L.J. 387 (1976).

They will be strictly construed. —

In accord with original. See *Argo Air, Inc. v. Scott*, 18 N.C. App. 506, 197 S.E.2d 256 (1973).

Purpose, etc. —

The statute against usury is striking at, and forbidding, the extraction or reception of more than a specified legal rate for the hire of money, and not for anything else. *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966); *State Whse. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Effect of Usury, etc. —

The charging of usurious interest strips the debt of all interest, and it simply becomes a loan which in law bears no interest. *Hansen v. Jonas W. Kessing Co.*, 15 N.C. App. 554, 190 S.E.2d 407, cert. denied, 282 N.C. 151, 191 S.E.2d 601 (1972).

Four Requisites, etc. —

In accord with 2nd paragraph in original. See *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966).

The elements of usury are these: (1) a loan or forbearance of money; (2) an understanding that the money loaned shall be returned; (3) payment or an agreement to pay a greater rate of interest than that allowed by law; and (4) a corrupt intent to take more than the legal rate for the use of the money loaned. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968); *Hodge v. First Atl. Corp.*, 10 N.C. App. 632, 179 S.E.2d 855, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971).

The statutory penalty for charging usury is the forfeiture of all interest on the loan. The charging of usurious interest as provided for by a partnership agreement is sufficient to cause a forfeiture of all the interest charged. The charging of such usurious interest strips the debt of all interest. It becomes simply a loan which in law bears no interest. Any payments of interest which have been made at a legal rate are by law applied to the only legal indebtedness — the principal sum. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971); *Argo Air, Inc. v. Scott*, 18 N.C. App. 506, 197 S.E.2d 256 (1973).

Should the court determine that the transaction was usurious, the court will (1) eliminate the indebtedness of all interest charged, (2) determine the amount of interest paid, and (3) give plaintiff credit on the indebtedness for twice the amount of interest paid. *Argo Air, Inc. v. Scott*, 18 N.C. App. 506, 197 S.E.2d 256 (1973).

Double Recovery Not Allowed If Actual Interest Paid Was Not Usurious. — Where a greater rate of interest than allowed by law was charged by means of a partnership agreement required, but no profit inured to the defendant under this agreement, and the only interest actually paid by plaintiff company was the 8% provided for in the note, this in itself was a legal rate so no usurious interest had been paid, and plaintiff company was not entitled to recover double the amount of the interest. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

And a renewal, etc. —

A renewal of the original obligations does not constitute a settlement of the plaintiff's right to invoke the statutory remedy for usury so as to purge the renewal contract of the taint. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968).

Brokerage Commission for Usurious Loan Not Prohibited. — The conduct condemned by the usury statutes is the extraction or reception of more than a specified legal rate for the hire of money, and not for anything else and brokerage commissions may be recovered for negotiating a usurious loan. *Hansen v. Jonas W. Kessing Co.*, 15 N.C. App. 554, 190 S.E.2d 407, cert. denied, 282 N.C. 151, 191 S.E.2d 601 (1972).

Defendant cannot avoid payment for brokerage services simply because the defendant and the lender chose to enter into an agreement which was in violation of the North Carolina usury statutes. There is nothing in this record to show that the plaintiff did more than bring the borrower and the lender together. He did not make the loan or negotiate its terms. *Hansen v. Jonas W. Kessing Co.*, 15 N.C. App. 554, 190 S.E.2d 407, cert. denied, 282 N.C. 151, 191 S.E.2d 601 (1972).

Applied in Lexington State Bank v. Suburban Printing Co., 7 N.C. App. 359, 172 S.E.2d 274 (1970); *River Dev. Corp. v. Parker Tree Farms, Inc.*, 12 N.C. App. 1, 182 S.E.2d 211 (1971).

II. SUBSTANCE CONTROLS NATURE OF TRANSACTION.

A. General Doctrine.

Form of Transaction, etc. —

If in fact the transaction is a bona fide sale and not a loan of money, it is not usurious. But if the form of the transaction is a subterfuge to conceal an exaction of more than the legal rate of interest on what is in fact a loan and not a sale, the transaction will be regarded according to its true character and will be held usurious. *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966).

B. Specific Instances.

Bonus. — A profit, greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, is a violation of the usury laws; it matters not what form or disguise it may assume. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968).

Commission. — If the lender charges a commission in addition to the maximum rate of interest permitted by the statute, such charge is usury. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968).

Fee for Finding Lender. — One who makes no loan but, as broker or agent of the borrower, finds a lender and procures the making of a loan by him, has not received usury when he collects a fee for his services. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968).

A bona fide credit sale, etc. —

In accord with 1st paragraph in original. See *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966).

In accord with 2nd paragraph in original. See *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966); *State Whse. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

There is no statute regulating time prices in general retail credit sales payable in instalments. *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966).

A purchaser is not, like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller. *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966); *State Whsle. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Usury cannot be predicated upon the fact that property is sold on a credit at an advance over what would be charged in case of a cash sale so long as it appears that the price charged is in fact fixed for the purchase of goods on credit with no intention or purpose of defeating the usury laws, even though the difference between the cash price and the credit price, if considered as interest, amounts to more than the legal rate. *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966).

A vendor may fix on his property one price for cash and another for credit, and the mere fact that the credit price exceeds the cash price by a greater percentage than is permitted by the usury laws is a matter of concern to the parties and not to the courts, barring evidence of bad faith. *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 151 S.E.2d 579 (1966); *State Whsle. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

The sale of merchandise is not usurious when the sale is made for one price if cash is paid and for a higher price if payment is deferred or made

in future installments, so long as the transaction is not a subterfuge to conceal a usurious loan. *State Whsle. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Charge for Forbearance in Collection of Debt at End of Payment Period. — The two percent per month service charge sought to be imposed by plaintiff did not constitute a "time price" but was a charge for plaintiff's forbearance in the collection of the debt at the end of the payment period; as such, the two percent per month service charge was interest and usurious. *State Whsle. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

VI. PLEADING AND PRACTICE.

Burden of Proof on Plaintiff. — Upon the trial of an action to recover for usury, the burden of proof is on the plaintiff throughout the trial to establish his cause of action. *Hodge v. First Atl. Corp.*, 10 N.C. App. 632, 179 S.E.2d 855, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971).

Where plaintiff failed to show that defendant did not in fact render services for the one percent "service charge" or "construction loan fee," defendant was entitled to directed verdict that such "charge" or "fee" was not a part of the interest charged on the loan. *Hodge v. First Atl. Corp.*, 10 N.C. App. 632, 179 S.E.2d 855, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971).

24-2.1. Transactions governed by Chapter. — For purposes of this Chapter, any extension of credit shall be deemed to have been made in this State, and therefore subject to the provisions of this Chapter if the lender offers or agrees in this State to lend to a borrower who is a resident of this State, or if such borrower accepts or makes the offer in this State to borrow, regardless of the situs of the contract as specified therein.

Any solicitation or communication to lend, oral or written, originating outside of this State, but forwarded to and received in this State by a borrower who is a resident of this State, shall be deemed to be an offer or agreement to lend in this State.

Any solicitation or communication to borrow, oral or written, originating within this State, from a borrower who is a resident of this State, but forwarded to, and received by a lender outside of this State, shall be deemed to be an acceptance or offer to borrow in this State. (1979, c. 706, s. 3.)

Editor's Note. — Session Laws 1979, c. 706, s. 4, makes this section effective July 1, 1979.

§ 24-4. Obligations due guardians to bear compound interest; rate of interest. — Guardians shall have power to lend any portion of the estate of their wards upon bond with sufficient security, to be repaid with interest annually, and all the bonds, notes or other obligations which he shall take as guardian shall bear compound interest, for which he must account, and he may assign the same to the ward on settlement with him. On loans made out of the estate of their wards, guardians may lend at any rate of interest not less than four percent per annum and not more than the maximum lawful rate. This section shall in no way limit or affect the powers of guardians to make other investments which are now

or may hereafter be authorized or permitted by the laws, statutory or otherwise, of the State of North Carolina. (1762, c. 69, P. R.; 1816, c. 925, P. R.; R. C., c. 54, s. 23; 1868-9, c. 201, s. 29; Code, s. 1592; Rev., s. 1953; C. S., s. 2308; 1943, c. 728; 1969, c. 1303, s. 4.)

Editor's Note. — The 1969 amendment substituted "lawful" for "legal" near the end of the second sentence. Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date. The act was

ratified July 2, 1969, and made effective on ratification.

For comment on equity participation (a device to circumvent usury laws) in real estate finance, see 7 N.C. Cent. L.J. 387 (1976).

§ 24-5. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.

Absent an agreement between parties, six percent per annum is the rate due on money owed under a contract. *Hardy-Latham v. Wellons*, 415 F.2d 674 (4th Cir. 1968).

And no discretion is vested in the court to determine what shall be the rate of interest in a given case. *Hardy-Latham v. Wellons*, 415 F.2d 674 (4th Cir. 1968).

Not Applicable When Appearance Bond Forfeited. — See opinion of Attorney General to Mr. Roy R. Holdford, Jr., 41 N.C.A.G. 809 (1972).

Trend Is Toward Allowance of Interest. —

In accord with original. See T.C. Allen Constr. Co. v. Stratford Corp., 384 F.2d 653 (4th Cir. 1967); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973).

Interest on Costs. — In this State, interest on costs is expressly disallowed by statute. *City of Charlotte v. McNeeley*, 281 N.C. 684, 190 S.E.2d 179 (1972).

When Interest Added to Damages, etc. —

In accord with original. See T.C. Allen Constr. Co. v. Stratford Corp., 384 F.2d 653 (4th Cir. 1967); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973).

Interest Allowed from Date of Breach. —

In accord with 1st paragraph in original. See T.C. Allen Constr. Co. v. Stratford Corp., 384 F.2d 653 (4th Cir. 1967); *Investment Properties of Asheville, Inc. v. Allen*, 281 N.C. 174, 188 S.E.2d 441 (1972), rev'd on other grounds, 283 N.C. 277, 196 S.E.2d 262 (1973); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973).

Where the amount of damages can be ascertained from the contract, interest is allowed from the date of the breach. *Interstate Equip. Co. v. Smith*, 292 N.C. 592, 234 S.E.2d 599 (1977).

Interest Provided from Date of Substantial Performance. — In an action on a construction contract, wherein the defendant counterclaimed for damages for plaintiff's failure to complete the work in a good and workmanlike manner, the judgment entered by the court on the jury verdict should have provided for interest thereon from August 1, 1964 (the date upon which, the jury concluded, plaintiff had substantially performed its contract), even though there was a bona fide dispute as to the correct balance due between plaintiff and defendant. *T.C. Allen Constr. Co. v. Stratford Corp.*, 384 F.2d 653 (4th Cir. 1967).

Tender of Payment. — To constitute a valid tender of payment in North Carolina and thus stop the running of interest, the offer must include the full amount the creditor is entitled to receive plus all interest to the date of tender. *Hardy-Latham v. Wellons*, 415 F.2d 674 (4th Cir. 1968).

Applied in International Harvester Credit Corp. v. Ricks, 16 N.C. App. 491, 192 S.E.2d 707 (1972).

Cited in Hyde v. Land-Of-Sky Regional Council, 572 F.2d 988 (4th Cir. 1978).

§ 24-7. Interest from verdict to judgment added as costs.

No discretion is vested in the court to determine what shall be the rate of interest in

a given case. *Hardy-Latham v. Wellons*, 415 F.2d 674 (4th Cir. 1968).

§ 24-8. Loans not in excess of \$300,000; what interest, fees and charges permitted. — No lender shall charge or receive from any borrower or require in connection with a loan any borrower, directly or indirectly, to pay, deliver, transfer or convey or otherwise confer upon or for the benefit of the lender or any other person, firm or corporation any sum of money, thing of value or other consideration other than that which is pledged as security or collateral to secure the repayment of the full principal of the loan, together with fees and interest provided for in chapter 24 or chapter 53 of the North Carolina General Statutes, where the principal amount of a loan is not in excess of three hundred thousand dollars (\$300,000.00); provided, this section shall not prevent a borrower from selling, transferring, or conveying property other than security or collateral to any person, firm or corporation for a fair consideration so long as such transaction is not made a condition or requirement for any loan; provided that this shall not prevent the lender from collecting from the borrower for remittance to others, money in payment of taxes, assessments, cost of upkeep, recording fees, surveys, attorneys' fees, fire, title, life and mortgage insurance premiums and other such fees and costs, nor from receiving the proceeds from any insurance policies where a loss occurs under the terms of such policies. This section shall not be applicable to any corporation licensed as a "Small Business Investment Company" under the provisions of the United States Code Annotated, Title 15, section 661, et seq. nor shall it be applicable to the sale or purchase of convertible debentures, nor to the sale or purchase of any debt security with accompanying warrants, nor to the sale or purchase of other securities through an organized securities exchange. (1961, c. 1142; 1969, c. 127; c. 1303, s. 5.)

Editor's Note. — The first 1969 amendment, effective March 26, 1969, made this section as enacted in 1961 applicable to loans to "any foreign or domestic real estate investment trust (being a trust as determined under the provisions of § 105-130.12 of the General Statutes of North Carolina)," as well as to loans to corporations.

The second 1969 amendment, effective July 2, 1969, rewrote the section to read as set out above. Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

For comment on equity participation (a device to circumvent usury laws) in real estate finance, see 7 N.C. Cent. L.J. 387 (1976).

Section Applicable to Loan Secured by North Carolina Realty. — Where a loan is secured by real estate located in North Carolina, the loan is subject to the laws of North Carolina relating to interest and usury. *Appalachian South, Inc. v. Construction Mtg. Corp.*, 11 N.C. App. 651, 182 S.E.2d 15, cert. denied, 279 N.C. 396, 183 S.E.2d 244 (1971).

What Constitutes Loan. — Definitions require that there be a delivery of money on the one hand and an understanding to repay on the other for a loan to have been made. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

North Carolina courts do not hesitate to look beneath the forms of transactions alleged to be usurious in order to determine whether or not such transactions are in truth and reality usurious. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Where a transaction is in reality a loan of money, whatever may be its form, and the lender charges for the use of his money a sum in excess of interest at the legal rate, by whatever name the charge may be called, the transaction will be held to be usurious. The law considers the substance and not the mere form or outward appearance of the transaction in order to determine what it in reality is. If this were not so, the usury laws of the State would easily be evaded by lenders of money who would exact from borrowers with impunity compensation for money loaned in excess of interest at the legal rate. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

What Plaintiff Must Show in Action for Usury. — In an action for usury plaintiff must show (1) that there was a loan, (2) that there was an understanding that the money lent would be returned, (3) that for the loan a greater rate of interest than allowed by law was paid, and (4) that there was corrupt intent to take more than the legal rate for the use of the money. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971); *Appalachian South, Inc. v. Construction Mtg. Corp.*, 11 N.C. App. 651, 182 S.E.2d 15, cert. denied, 279 N.C. 396, 183 S.E.2d 244 (1971).

The court may declare a transaction **usurious as a matter of law** where there is no dispute as to the facts. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971); *Appalachian South, Inc. v. Construction Mtg. Corp.*, 11 N.C. App. 651, 182 S.E.2d 15, cert. denied, 279 N.C. 396, 183 S.E.2d 244 (1971).

The corrupt intent required to constitute usury is simply the intentional charging of more for money lent than the law allows. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971); *Appalachian South, Inc. v. Construction Mtg. Corp.*, 11 N.C. App. 651, 182 S.E.2d 15, cert. denied, 279 N.C. 396, 183 S.E.2d 244 (1971).

Where the lender intentionally charges the borrower a greater rate of interest than the law allows and his purpose is clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971); *Appalachian South, Inc. v. Construction Mtg. Corp.*, 11 N.C. App. 651, 182 S.E.2d 15, cert. denied, 279 N.C. 396, 183 S.E.2d 244 (1971).

A 25% interest in a partnership (which owned the realty conveyed to it by plaintiff)

§ 24-9. Loans to corporations organized for profit not subject to claim or defense of usury. — Notwithstanding any other provision of this Chapter or any other provision of law, any foreign or domestic corporation substantially engaged in commercial, manufacturing or industrial pursuits for pecuniary gain may agree to pay, and any lender may charge and collect from such corporation, interest at any rate which such corporation may agree to pay in writing, and as to any such transaction the claim or defense of usury by such corporation and its successors or anyone else in its behalf is prohibited. (1963, c. 753, s. 1; 1965, c. 335; 1969, c. 896; 1979, c. 138, s. 5.)

Local Modification. — By virtue of Session Laws 1967, c. 755, New Hanover should be stricken from the replacement volume.

Editor's Note. — The 1969 amendment rewrote the former last sentence, which was deleted by the 1979 amendment.

The 1979 amendment substituted "lender" for "commercial factor" near the middle of the section, deleted "provided such interest is charged upon loans, advances or forbearances

was a "thing of value." *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

And this made the partnership agreement unlawful. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Hence, the loan was usurious under this section. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Transaction Violating Statute Unenforceable. — Where the defendant's counterclaims relate to the limited partnership and the trial court correctly adjudged that the loan transaction considered as a whole violated this section, it followed, therefore, that the limited partnership agreement and the conveyances made to the partnership contrary to this section were void and the courts will not lend their aid to the enforcement of a contract which is unlawful and violates its positive legislation. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Cited in *Lexington State Bank v. Suburban Printing Co.*, 7 N.C. App. 359, 172 S.E.2d 274 (1970); *Hansen v. Jonas W. Kessing Co.*, 15 N.C. App. 554, 190 S.E.2d 407 (1972).

which are secured by liens upon or security interests in accounts receivable, materials, goods in process, inventory, machinery, equipment and other similar personal property, whether tangible or intangible" after "pay in writing" near the end of the section, and deleted the former second sentence which defined the term "commercial factor."

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 24-10. Maximum fees on loans secured by real property. — (a) No lender on loans made under G.S. 24-1.1 shall charge or receive from any borrower or any agent for a borrower, any fees or discounts unless otherwise allowed where the principal amount is less than three hundred thousand dollars (\$300,000) and is secured by real property, which fees or discounts in the aggregate shall exceed two percent (2%) if a construction loan on other than a one or two family dwelling, and one percent (1%) on any other type of loan; provided, however, if a single lender makes both the construction loan and a permanent loan utilizing one note, the lender may collect the fees as if they were two separate loans; provided, in addition to the fees authorized above, a seller or any agent for a

seller in a real estate sales transaction may pay to the lender in connection with the making of a loan, fees or discounts in the aggregate not to exceed two percent (2%). Except as provided herein or otherwise allowed, no party shall pay for the benefit of the lender any other fees or discounts.

(b) Any loan made under G.S. 24-1.1 in an original principal amount of one hundred thousand dollars (\$100,000.00) or less may be prepaid in part or in full, after 30 days notice to the lender, with a maximum prepayment fee of two percent (2%) of the outstanding balance at any time within three years after the first payment of principal and thereafter there shall be no prepayment fee, provided that there shall be no prepayment fee charged or received in connection with any repayment of a construction loan; and except as herein provided, any lender and any borrower may agree on any terms as to prepayment of a loan.

(c) "Construction loan" means a loan which is obtained for the purpose of financing fully, or in part, the cost of constructing buildings or other improvements upon real property and the proceeds of which, under the terms of a written contract between a lender and a borrower, are to be disbursed periodically as such construction work progresses; and such loan shall be payable in full not later than 18 months in case of a loan made under the provisions of G.S. 24-1.1(1) or 36 months in case of any other construction loan made after the execution of the note by the borrower. A construction loan may include advances for the purchase price of the property upon which such improvements are to be constructed.

(d) Any lender may charge any person, persons, firm or corporation that assumes a loan made under the provisions of G.S. 24-1.1, where the principal amount assumed is not more than fifty thousand dollars (\$50,000) and is secured by real property, a fee not to exceed one percent (1%) of the principal amount due or twenty-five dollars (\$25.00), whichever is less.

(e) Any lender may charge a party to a loan made under G.S. 24-1.1A, a late payment charge on any installment of principal, interest, or both in an amount not to exceed four percent (4%) of such installment. The charges authorized by this subsection may not be charged by a lender unless an installment is more than 15 days past due; provided, however, for the purposes of this subsection, a late payment charge may not be charged until an installment is more than 30 days past due where interest on such installment is paid in advance.

(f) Any lender may charge a party to a mortgage loan made under G.S. 24-1.1 a late payment charge in an amount not to exceed four percent (4%) of any installment which is more than 15 days past due. (1967, c. 852, s. 1; 1969, c. 40; c. 1303, s. 6; 1971, c. 1168; 1979, c. 684; c. 849, s. 1; c. 969.)

Editor's Note. — The second 1969 amendment rewrote this section as amended by the first 1969 amendment. Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

The 1971 amendment added subsection (d).

The first 1979 amendment added subsections (e) and (f).

The second 1979 amendment, in the first sentence of subsection (a), substituted "any fees or discounts unless otherwise allowed" for "or from any agent, seller or broker, which inures to the benefit of the lender, any fees or discounts in addition to the provisions of G.S. 24-10(b) or in addition to lawful interest in connection with any

loan" near the beginning of the sentence, substituted "and one percent (1%) on any other type of loan" for "one percent (1%) if a construction loan on a one or two family dwelling, and one percent (1%) if other than a construction loan" near the middle of the sentence, inserted "however" and "both" and substituted "a" for "the" preceding "permanent" in the first proviso, substituted "as if they were two separate loans" for "herein provided for construction loans and the fees for any other construction loans" at the end of the first proviso, and added the second proviso. The amendment also added the second sentence of subsection (a).

The third 1979 amendment, effective June 8, 1979, inserted "in connection with the making of

a loan" after "may pay to the lender" in the second proviso to the first sentence of subsection (a).

Section 1.2, c. 852, Session Laws 1967, provides: "The provisions of this act shall not apply to any loan made prior to the effective date of this act." The act was ratified June 21, 1967 and made effective on ratification.

Session Laws 1979, c. 849, s. 2 provides: "This act is effective upon ratification [June 8, 1979] but the last proviso contained in subsection (a) of G.S. 24-10 shall expire on June 30, 1981."

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971). For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969). For a note on the operation of a due-on-sale clause in a deed of trust to allow a lender to exact higher interest rates from the grantee of a mortgagor, see 13 Wake Forest L. Rev. 490 (1977).

Cited in *Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 224 S.E.2d 580 (1976).

§ 24-11. Certain revolving credit charges. — (a) On the extension of credit under an open-end credit or similar plan (including revolving credit card plans, and revolving charge accounts, but excluding any loan made directly by a lender under a check loan, check credit or other such plan) under which no service charge shall be imposed upon the consumer or debtor if the account is paid in full within 25 days from the billing date, there may be charged and collected interest, finance charges or other fees at a rate in the aggregate not to exceed one and one-half percent (1½%) per month computed on the unpaid balance of the previous month or the average daily balance outstanding during the billing period. No person, firm or corporation may charge a discount or fee in excess of six percent (6%) of the principal amount of the accounts acquired from or through any vendors or others providing services who participate in such plan.

(b) On revolving credit loans (including check loans, check credit or other revolving credit plans whereby a bank, banking institution or other lending agency makes direct loans to a borrower), if agreed to in writing by the borrower, such lender may collect interest and service charges by application of a monthly periodic rate computed on the average daily balance outstanding during the billing period, such rate not to exceed one and one-quarter percent (1¼%) on such balance up to and including five thousand dollars (\$5,000), and such rate not to exceed one percent (1%) on such balance in excess of five thousand dollars (\$5,000).

(c) Any extension of credit under an open-end or similar plan under which there is charged a monthly periodic rate greater than one and one-quarter percent (1¼%) may not be secured by real or personal property or any other thing of value, provided, that this subsection shall not apply to consumer credit sales regulated by Chapter 25A, the Retail Installment Sales Act; provided further, that in any action initiated for the possession of property in which a security interest has been taken, a judgement for the possession thereof shall be restricted to commercial units (as defined in G.S. 25-2-105(6)) for which the cash price was one hundred dollars (\$100.00) or more.

(d) The term "billing date" shall mean any date selected by the creditor and the bill for the balance of the account must be mailed to the customer at least 14 days prior to the date specified in the statement as being the date by which payment of the new balance must be made in order to avoid the imposition of any finance charge. (1967, c. 852, s. 1.1; 1969, c. 1303, s. 7; 1977, c. 148, s. 1; cc. 917, 1108.)

Editor's Note. — The 1969 amendment rewrote this section. Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

The first 1977 amendment substituted

"debtor" for "creditor" near the middle of the first sentence of subsection (a).

The second 1977 amendment, in subsection (a), substituted "debtor" for "creditor," inserted "in full" and "computed," and added "or the average daily balance outstanding during the billing period," all in the first sentence, deleted the former second sentence, which read "Such

extension of credit may not be secured by real or personal property or any other thing of value," and substituted "six percent (6%)" for "four percent (4%)" and "vendors" for "vendor" in the present second sentence. In subsection (b), the amendment substituted the language beginning "by application of a monthly periodic rate" for "which shall not exceed one and one-fourth percent (1¼%) per month computed on the average balance outstanding of the previous months" at the end of the subsection and deleted the former second sentence which read "Such loans, exclusive of interest, may not at any time exceed five thousand dollars (\$5,000.00) and may not be secured by real or personal property or any other thing of value." The amendment also added subsections (c) and (d).

The third 1977 amendment substituted the language beginning "and the bill for the balance of the account" for "but shall not be earlier than the date any bill for the balance of the account is mailed to the debtor" in subsection (d) as added by the second 1977 amendment.

Section 1.2, c. 852, Session Laws 1967, provides: "The provisions of this act shall not apply to any loan made prior to the effective date of this act." The act was ratified June 21, 1967 and made effective on ratification.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969). For survey of 1976

case law on insurance, see 55 N.C.L. Rev. 1052 (1977).

Section Applicable to Transactions between Merchants. — The application of this section is not limited to "consumer credit sales"; it extends to transactions between merchants as well as transactions involving a consumer. *State Whsle. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Open Insurance Account. — Sections 24-11 and 58-56.1 authorize an insurance agent who extends customer credit on an open account to impose a finance charge on his own customers in an amount not to exceed an aggregate annual rate of 18 percent. *Hyde Ins. Agency, Inc. v. Noland*, 30 N.C. App. 503, 227 S.E.2d 169 (1976).

Imposition of Finance Charges on Open Insurance Account without Prior Express Agreement. — It was the intention of the legislature to authorize the imposition of finance charges on an open insurance account, even though there had not been any prior express agreement between the parties regarding such charges, but such charges could not be imposed unless the debtor was given proper notice that the creditor intended to impose such finance charges. *Hyde Ins. Agency, Inc. v. Noland*, 30 N.C. App. 503, 227 S.E.2d 169 (1976).

ARTICLE 2.

Loans Secured by Secondary or Junior Mortgages.

§ 24-12. Applicability of Article. — This Article shall apply only to loans of money:

- (1) Secured in whole or in part by a security instrument on real property, other than a first security instrument on real property; and
- (2) The principal amount of the loan does not exceed seven thousand five hundred dollars (\$7,500); and
- (3) The loan is repayable in no less than six nor more than 72 successive monthly payments, which payments shall be substantially equal in amount. (1971, c. 1229, s. 2.)

Editor's Note. — Session Laws 1971, c. 1229, s. 3, makes this Article effective July 1, 1971.

§ 24-13. Principal amount defined. — The aggregate of the amount or value actually received at the time of the loan, plus the hereinafter stated rate of charge, plus the sum of all existing indebtedness of the borrower paid on his behalf by the lender, shall be deemed the principal amount of the loan. (1971, c. 1229, s. 2.)

Quoted in *Clemmer v. Liberty Fin. Planning, Inc.*, 467 F. Supp. 272 (W.D.N.C. 1979).

§ 24-14. Limitations on charges and interest. — (a) No person, copartnership, association, trust, corporation or other legal entity making loans under this Article may charge, take or receive, directly or indirectly,

(1) Actuarial interest in excess of twelve percent (12%) per annum on the principal amount of the loan; and

(2) A rate of charge in excess of ten percent (10%) of the principal amount of the loan or five hundred dollars (\$500.00), whichever is less.

(b) The rate of charge as used in subdivision (2), subsection (a) above shall include any and every type of charge for compensation, consideration or expense, or for any other purpose whatsoever, including whatsoever name called, but not by way of limitation, application fees, title searches, title reports, title opinions, title guarantees, credit reports, investigation costs, preparation of instruments, placement or discount fees, brokerage fees, recordings, appraisals, other closing costs, and insurance of any nature except as provided in subsection (c) below, but shall not include actuarial interest at the rate of twelve percent (12%) per annum or less as authorized in the preceding subsection or any charges as authorized in G.S. 24-15.

(c) Evidence of hazard insurance may be required by the lender of the borrower. Decreasing term credit life insurance is optional, in an amount not exceeding the sum of the monthly installments payable under the loan and for a period not exceeding the term of the loan; provided (i) that the borrower has indicated a desire to purchase such insurance by signing a statement to that effect, (ii) that the borrower is advised that he may acquire this insurance from any insurance carrier, (iii) that the borrower is aware that this insurance may be rescinded within 15 days after receipt of the policy, and (iv) that the borrower directs the lender to purchase the above insurance from the proceeds of his loan.

The rates for the herein described insurance shall not exceed the standard rates approved by the Commissioner of Insurance for such insurance. Proof of all insurance issued in connection with loans subject to this Article shall be furnished to the borrower within 10 days from the date of application therefor by said borrower.

(d) No application fee or other charge shall be allowed in the event the loan is not consummated.

(e) The borrower shall further have the right to anticipate payment of his debt in whole or in part at any time, without payment of interest penalty, or any other fee or charge for such prepayment. (1971, c. 1229, s. 2; 1973, c. 1150; 1977, c. 698, ss. 1, 2.)

Editor's Note. — The 1973 amendment substituted "five hundred dollars (\$500.00)" for "three hundred dollars (\$300.00)" in subdivision (2) of subsection (a).

The 1977 amendment added "or any charges as authorized in G.S. 24-15" in subsection (b). In subsection (c), designated the former fourth and fifth sentences as the second paragraph, and in

the present first paragraph, inserted "credit" and "is optional" in the second sentence, substituted the language beginning "provided (i) that the borrower" for "may also be required by the lender" at the end of the second sentence, and deleted the former third sentence, which related to the premium of term life insurance if paid by the lender on behalf of the borrower.

§ 24-15. Rebates and late charges. — (a) If a renewal or additional loan shall be made to the same borrower within 36 months after the original loan, or after a previous renewal or additional loan, the borrower shall receive a pro rata rebate from the previously charged rate of charge computed by multiplying the number of months remaining in the loan contract by that quotient obtained by dividing the rate of charge by the total number of months in the loan contract of the loan which has been liquidated or renewed. Charges and fees actually paid by the lender to others and which did not inure to the benefit of the lender shall not be included in the computation of rebates.

(b) A delinquent or late charge of five percent (5%) of the monthly payment or five dollars (\$5.00), whichever is less, may be charged on any installment delinquent more than 15 days after the regularly scheduled due date, said charge to be made only once after the regularly scheduled due date. (1971, c. 1229, s. 2; 1977, c. 698, s. 3.)

Editor's Note. — The 1977 amendment, in the second sentence of subsection (a), substituted "Charges and" for "Appraisal or recording" at

the beginning and deleted "for appraisals and registration" following "paid by the lender to others."

§ 24-16. Itemized closing statements. — Any person, copartnership, association, trust, corporation, or any other legal entity making on its own behalf, or as agent, broker or in other representative capacity on behalf of any other person, copartnership, association, trust, corporation or any other legal entity, a loan or real property financing transaction within the regulatory authority of this Article, at the time of the closing shall furnish the debtor or borrower or grantor in the mortgage, deed of trust or any other security instrument, in addition to the disclosures required by federal law known as "Truth in Lending," a complete and itemized closing statement which shall show all disbursements of the loan proceeds and which shall total the principal amount of the loan or security transaction, and the said closing statement shall be signed by the lending agency or a representative of the lending agency, or a responsible officer in its behalf and a completed and signed additional copy retained in the files of the lending agency involved and available at all reasonable times to the borrower, the borrower's successor in interest to the security real property, or the authorized agent of the borrower or the borrower's successor, until such time as the security instrument shall be satisfied in full. Such closing statement shall contain the following language printed in a conspicuous manner:

"This loan is one regulated by the provisions of Chapter 24, Article 2 of the General Statutes of North Carolina entitled 'Loans Secured by Secondary or Junior Mortgages'." (1971, c. 1229, s. 2.)

Quoted in *Clemmer v. Liberty Fin. Planning, Inc.*, 467 F. Supp. 272 (W.D.N.C. 1979).

§ 24-16.1. Loans exempt from §§ 24-12 to 24-17. — G.S. 24-12 to 24-17 shall not apply to loans made by banks, insurance companies, or their duly designated agents compensated directly by the lender, duly licensed credit unions, production credit associations authorized by the Farm Credit Act of 1933, or savings and loan associations authorized to do business in this State, or to loans made by any other lender licensed by, and under the supervision of, the Commissioner of Banks and the State Banking Commission, under the provisions of Chapter 53 of the General Statutes, or the Commissioner of Insurance, under the provisions of Chapter 58 of the General Statutes. (1971, c. 1229, s. 2.)

§ 24-17. Misdemeanors. — A wilful or knowing violation of G.S. 24-12 through G.S. 24-16 is hereby made a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1971, c. 1229, s. 2.)

Chapter 25.

Uniform Commercial Code.

Article 1.

General Provisions.

- Part 1. Short Title, Construction, Application
and Subject Matter
of the Act.

Sec.

- 25-1-105. Territorial application of the act;
parties' power to choose applicable
law.

Part 2. General Definitions and
Principles of Interpretation.

- 25-1-201. General definitions.
25-1-209. Subordinated obligations.

Article 2.

Sales.

Part 1. Short Title, General Construction
and Subject Matter.

- 25-2-106. Definitions: "Contract"; "agreement";
"contract for sale"; "sale";
"present sale"; "conforming" to
contract; "termination"; "cancel-
lation."
25-2-107. Goods to be severed from realty;
recording.

Part 2. Form, Formation and Readjust-
ment of Contract.

- 25-2-207. Additional terms in acceptance or
confirmation.
25-2-208. Course of performance or practical
construction.

Part 3. General Obligation and Con-
struction of Contract.

- 25-2-302. Unconscionable contract or clause.

Part 5. Performance.

- 25-2-501. Insurable interest in goods; manner of
identification of goods.

Part 7. Remedies.

- 25-2-702. Seller's remedies on discovery of
buyer's insolvency.
25-2-704. Seller's right to identify goods to the
contract notwithstanding breach
or to salvage unfinished goods.
25-2-716. Buyer's right to specific performance
or replevin.
25-2-723. Proof of market price; time and place.
25-2-725. Statute of limitations in contracts for
sale.

Article 3.

Commercial Paper.

Part 3. Rights of a Holder.

Sec.

- 25-3-305. Rights of a holder in due course.

Part 5. Presentment, Notice of Dishonor
and Protest.

- 25-3-501. When presentment, notice of dishonor,
and protest necessary or
permissible.

Part 8. Miscellaneous.

- 25-3-802. Effect of instrument on obligation for
which it is given.

Article 4.

Bank Deposits and Collections.

Part 1. General Provisions and Definitions.

- 25-4-106. Separate office of a bank.

Part 2. Collection of Items: Depositary
and Collecting Banks.

- 25-4-204. Methods of sending and presenting;
sending direct to payor.
25-4-211. Media of remittance; provisional and
final settlement in remittance
cases.

Part 4. Relationship Between Payor
Bank and Its Customer.

- 25-4-405. Death or incompetence of customer.

Article 5.

Letters of Credit.

- 25-5-116. Transfer and assignment.
25-5-117. Insolvency of bank holding funds for
documentary credit.

Article 6.

Bulk Transfers.

- 25-6-106. [Repealed.]
25-6-107. The notice.
25-6-108. Auction sales; "auctioneer."
25-6-109. What creditors protected.

Article 7.

Warehouse Receipts, Bills of Lading and
Other Documents of Title.

Part 2. Warehouse Receipts: Special
Provisions.

- 25-7-209. Lien of warehouseman.

Part 3. Bills of Lading: Special Provisions.

Sec.

- 25-7-301. Liability for non-receipt or misdescription; "said to contain"; "shipper's load and count"; improper handling.

Article 8.

Investment Securities.

Part 1. Short Title and General Matters.

- 25-8-102. Definitions and index of definitions.

Part 4. Registration.

- 25-8-403. Limited duty of inquiry.
25-8-407. [Repealed.]

Article 9.

Secured Transactions; Sales of Accounts and Chattel Paper.

Part 1. Short Title, Applicability and Definitions.

- 25-9-101. Short title.
25-9-102. Policy and subject matter of article.
25-9-103. Perfection of security interests in multiple-state transactions.
25-9-104. Transactions excluded from article.
25-9-105. Definitions and index of definitions.
25-9-106. Definitions: "Account"; "general intangibles."
25-9-107. Definitions: "Purchase money security interest."
25-9-108. When after-acquired collateral not security for antecedent debt.
25-9-109. Classification of goods: "Consumer goods"; "equipment"; "farm products"; "inventory."
25-9-110. Sufficiency of description.
25-9-111. Applicability of bulk transfer laws.
25-9-112. Where collateral is not owned by debtor.
25-9-113. Security interests arising under article on sales.
25-9-114. Consignment.

Part 2. Validity of Security Agreement and Rights of Parties Thereto.

- 25-9-201. General validity of security agreement.
25-9-201.1. [Repealed.]
25-9-202. Title to collateral immaterial.
25-9-203. Attachment and enforceability of security interest; proceeds; formal requisites.
25-9-204. After-acquired property; future advances.
25-9-205. Use or disposition of collateral without accounting permissible.
25-9-206. Agreement not to assert defenses against assignee; modification of

Sec.

sales warranties where security agreement exists.

- 25-9-207. Rights and duties when collateral is in secured party's possession.
25-9-208. Request for statement of account or list of collateral.

Part 3. Rights of Third Parties; Perfected and Unperfected Security Interests; Rules of Priority.

- 25-9-301. Persons who take priority over unperfected security interests; rights of "lien creditor."
25-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply.
25-9-303. When security interest is perfected; continuity of perfection.
25-9-304. Perfection of security interest in instruments, documents, and goods covered by documents; perfection by permissive filing; temporary perfection without filing or transfer of possession.
25-9-305. When possession by secured party perfects security interest without filing.
25-9-306. "Proceeds"; secured party's rights on disposition of collateral.
25-9-307. Protection of buyers of goods.
25-9-308. Purchase of chattel paper and instruments.
25-9-309. Protection of purchasers of instruments and documents.
25-9-310. Priority of certain liens arising by operation of law.
25-9-311. Alienability of debtor's rights; judicial process.
25-9-312. Priorities among conflicting security interests in the same collateral.
25-9-313. Priority of security interests in fixtures.
25-9-314. Accessions.
25-9-315. Priority when goods are commingled or processed.
25-9-316. Priority subject to subordination.
25-9-317. Secured party not obligated on contract of debtor.
25-9-318. Defenses against assignee; modification of contract after notification of assignment; term prohibiting assignment ineffective; identification and proof of assignment.

Part 4. Filing.

- 25-9-401. Place of filing; erroneous filing; removal of collateral.
25-9-402. Formal requisites of financing statement; amendments; mortgage as financing statement.

Sec.

- 25-9-403. What constitutes filing; duration of filing; effect of lapsed filing; duties of filing officer.
 25-9-404. Termination statement.
 25-9-405. Assignment of security interest; duties of filing officer; fees.
 25-9-406. Release of collateral; duties of filing officer; fees.
 25-9-407. Information from filing officer.
 25-9-408. Financing statements covering consigned or leased goods.

Part 5. Default.

- 25-9-501. Default; procedure when security agreement covers both real and personal property.
 25-9-502. Collection rights of secured party.
 25-9-503. Secured party's right to take possession after default.
 25-9-504. Secured party's right to dispose of collateral after default; effect of disposition.
 25-9-504.1. Payment of surplus to clerk.
 25-9-504.2. Special proceedings to determine ownership of surplus.
 25-9-505. Compulsory disposition of collateral; acceptance of the collateral as discharge of obligation.
 25-9-506. Debtor's right to redeem collateral.
 25-9-507. Secured party's liability for failure to comply with this part.
 25-9-508. Application of statute of limitations to serial notes.
 25-9-509. Power of sale barred when foreclosure barred.

ARTICLE 1.

General Provisions.

PART 1.

SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT.

§ 25-1-101. Short title.

Editor's Note. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

§ 25-1-102. Purposes; rules of construction; variation by agreement.

Use of Cases from Other Jurisdictions. — Cases from other jurisdictions including some opinions by referees in bankruptcy and by the federal district courts were not necessarily

Part 6. Public Sale Procedures.

Sec.

- 25-9-601. Disposition of collateral by public sale.
 25-9-602. Contents of notice of sale.
 25-9-603. Posting and mailing notice of sale.
 25-9-604. Exception as to perishable property.
 25-9-605. Postponement of public sale.
 25-9-606. Procedure upon dissolution of order restraining or enjoining sale.
 25-9-607. Disposition of proceeds of sale.

Article 10.

Effective Date and Repealer.

- 25-10-105. [Repealed.]
 25-10-107. [Repealed.]

Article 11.

1975 Amendatory Act — Effective Date and Transition Provisions.

- 25-11-101. Effective date.
 25-11-101.1. Definitions.
 25-11-102. Preservation of old transition provisions.
 25-11-103. Transition to new article 9; general rule.
 25-11-104. Transition provisions on change of requirement of filing.
 25-11-105. Transition provisions on change of place of filing.
 25-11-106. Required refilings.
 25-11-107. Transition provisions as to priorities.
 25-11-108. Presumption that rule of law continues unchanged.

Cited in Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974); Little v. County of Orange, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

authoritative in this jurisdiction, but the Court of Appeals looked to them for guidance and explanation, remembering that one of the purposes of the Uniform Commercial Code is "to

make uniform the law among various jurisdictions." *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120, rev'd on other grounds, 279 N.C. 352, 183 S.E.2d 109 (1971).

Applied in *Michigan Nat'l Bank v. Flowers Mobile Homes Sales*, 26 N.C. App. 690, 217

S.E.2d 108 (1975); *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Stated in *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

§ 25-1-103. Supplementary general principles of law applicable.

Editor's Note. — For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

Trust Doctrine. — One principle made applicable by this section is the doctrine of trust pursuit under which a *cestui que* trust is enabled to follow the trust funds through changes in their state and form in the hands of the trustee. *Michigan Nat'l Bank v. Flowers Mobile Homes Sales*, 26 N.C. App. 690, 217 S.E.2d 108 (1975).

Rescission. — Assuming without deciding that rescission remains available to a buyer as a

remedy by virtue of this section, the Supreme Court gave effect to a buyer's allegation of "rescission" as an allegation of "revocation of acceptance" since that Code concept more nearly reflected the claims asserted by the buyer. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Cited in *American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union*, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

§ 25-1-105. Territorial application of the act; parties' power to choose applicable law.

(2) Where one of the following provisions of this Chapter specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. (G.S. 25-2-402).

Applicability of the article on bank deposits and collections. (G.S. 25-4-102).

Bulk transfers subject to the article on bulk transfers. (G.S. 25-6-102).

Applicability of the article on investment securities. (G.S. 25-8-106).

Perfection provisions of the article on secured transactions. (G.S. 25-9-103). (1965, c. 700, s. 1; 1975, c. 862, s. 1.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, substituted the last line in subsection (2) for a provision which read: "Policy and scope of the article on secured transactions §§ 25-9-102 and 25-9-103."

As the rest of the section was not changed by the amendment only subsection (2) is set out.

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

Cited in *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E.2d 711 (1973).

§ 25-1-106. Remedies to be liberally administered.

Purpose of Point 4 of Official Comment to § 25-2-715. — It was to bring the law into harmony with the market place that the draftsmen of the Uniform Commercial Code said in Point 4 of the Official Comment to § 25-2-715: "The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical

precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances." *Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 467 F.2d 588 (4th Cir. 1972).

Applied in *Industrial Circuits Co. v. Terminal Communications, Inc.*, 26 N.C. App. 536, 216 S.E.2d 919 (1975).

Quoted in *North Carolina Nat'l Bank v. Sharpe*, 35 N.C. App. 404, 241 S.E.2d 360 (1978).

PART 2.

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION.

§ 25-1-201. **General definitions.** — Subject to additional definitions contained in the subsequent articles of this chapter which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in this chapter:

(9) “Buyer in ordinary course of business” means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. “Buying” may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(28) “Organization” includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(37) “Security interest” means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (G.S. 25-2-401) is limited in effect to a reservation of a “security interest”. The term also includes any interest of a buyer of accounts or chattel paper which is subject to article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under G.S. 25-2-401 is not a “security interest,” but a buyer may also acquire a “security interest” by complying with article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a “security interest” but a consignment is in any event subject to the provisions on consignment sales (G.S. 25-2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security. (1967, c. 562, s. 1; 1975, c. 862, ss. 2, 3.)

Editor’s Note. — The 1967 amendment, effective at midnight June 30, 1967, deleted “property” between “common” and “interest” in subsection (28).

Section 10, c. 562, Session Laws 1967, provides: “This act shall become effective at midnight on June 30, 1967. This act becomes effective on the same date as the Uniform Commercial Code, and the fact that the provisions of this act were enacted at a later date than the Uniform Commercial Code shall not be considered in construing the provisions contained herein or any provisions of the Uniform Commercial Code.”

The 1975 amendment, effective July 1, 1976, added the second sentence in subsection (9), substituted “accounts or chattel paper” for

“accounts, chattel paper, or contract rights” in the third sentence of subsection (37).

As the rest of the section was not changed by the amendments, only the introductory language and subsections (9), (28) and (37) are set out.

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966). For article on waiver of defense clauses in consumer contracts, see 48 N.C.L. Rev. 545 (1970). For a note on consignments and the consignor’s duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

“**Conspicuousness.**” — Determination on conspicuousness is a question of law for the

court. *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976).

Good faith ("honesty in fact") and "notice," although not synonymous, are inherently intertwined. Therefore, the relation between the two cannot be ignored. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

The same facts which call a party's "good faith" into question may also give him "notice of a defense." *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Albeit "good faith" is literally defined as "honesty in fact in the conduct or transaction concerned," the Uniform Commercial Code does not permit parties to intentionally keep themselves in ignorance of facts which, if known, would defeat their rights in a negotiable document of title. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

"Holder". — The definition of "holder" in subdivision (20) of this section is applicable to § 45-21.16. In *re Cooke*, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Ownership is not indispensable to holdership. In *re Cooke*, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

There was ample evidence that the beneficiaries of a deed of trust were holders of a valid debt where the notes secured by the deed of trust were payable to the beneficiaries or order, the notes were not endorsed, and the notes were in the possession of the original beneficiary-payees. In *re Cooke*, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

As evidence that a plaintiff is holder of a note is an essential element of a cause of action upon such note, the defendant was entitled to demand strict proof of this element. The incorporation by reference into the complaint of a copy of the note was not in itself sufficient evidence to establish for purposes of summary judgment that the plaintiff was the holder of the note. *Liles v. Myers*, 38 N.C. App. 525, 248 S.E.2d 385 (1978).

"Security Interest". — This section defines "security interest" without reference to whether title is in the vendor or the vendee under the security agreement. *Szabo Food Serv., Inc. v.*

Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974).

Clause (b) of subsection (37) is not consistent with the fundamental proposition that to create a security interest the parties must have intended to create one. *Szabo Food Serv., Inc. v. Balentine's, Inc.*, 285 N.C. 452, 206 S.E.2d 242 (1974).

"Signed". — Because of the importance placed upon financing statements, in cases dealing with the debtor's signature on financing statements the courts should apply the liberal definition of "signed" in subsection (39) of this section with caution. *Provident Fin. Co. v. Beneficial Fin. Co.*, 36 N.C. App. 401, 244 S.E.2d 510, *cert. denied*, 295 N.C. 549, 248 S.E.2d 728 (1978).

Applied in *EAC Credit Corp. v. Wilson*, 281 N.C. 140, 187 S.E.2d 752 (1972); *Bulliner v. GMC*, 54 F.R.D. 479 (E.D.N.C. 1971); *Moser v. Employers Com. Union Ins. Co. of America*, 25 N.C. App. 309, 212 S.E.2d 664 (1975); *Landrum v. Armbruster*, 28 N.C. App. 250, 220 S.E.2d 842 (1976); *Southern Nat'l Bank v. Pocock*, 29 N.C. App. 52, 223 S.E.2d 518 (1976); *General Elec. Co. v. Pennell*, 31 N.C. App. 510, 229 S.E.2d 713 (1976); *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E.2d 46 (1977); *Smathers v. Smathers*, 34 N.C. App. 724, 239 S.E.2d 637 (1977); *Rozen v. North Carolina Nat'l Bank*, 588 F.2d 83 (4th Cir. 1978).

Quoted in *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850 (1971); *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971); *First Citizens Bank & Trust Co. v. Larson*, 22 N.C. App. 371, 206 S.E.2d 775 (1974); *Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 224 S.E.2d 580 (1976); *Little v. County of Orange*, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

Stated in *Branch Banking & Trust Co. v. Gill*, 286 N.C. 342, 211 S.E.2d 327 (1975).

Cited in *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976); *Mazda Motors of America, Inc. v. Southwestern Motors, Inc.*, 36 N.C. App. 1, 243 S.E.2d 793 (1978); *Bank of N.C. v. Cranfill*, 37 N.C. App. 182, 245 S.E.2d 538 (1978).

§ 25-1-203. Obligation of good faith.

Stated in *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. 1977).

Cited in *Lexington State Bank v. Suburban*

Printing Co., 7 N.C. App. 359, 172 S.E.2d 274 (1970).

§ 25-1-204. Time; reasonable time; "seasonably."

Applied in *Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975); *Harrington Mfg. Co. v.*

Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282 (1979).

§ 25-1-205. Course of dealing and usage of trade.

Trade Usage May Be Matter of Fact or Law.

— Ordinarily, the existence and the scope of a usage of trade are questions of fact to be determined by the fact finder. When, however, it is established that a usage of trade is embodied in a written code or similar writing, the interpretation of the writing becomes a question of law for the court. *Superior Foods, Inc. v.*

Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

Stated in *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. 1977).

Cited in *Recreatives, Inc. v. Travel-On Motorcycles Co.*, 29 N.C. App. 727, 225 S.E.2d 637 (1976).

§ 25-1-206. Statute of frauds for kinds of personal property not otherwise covered.

Editor's Note. — For article on statute of frauds as to personal property under the

Uniform Commercial Code, see 4 Wake Forest Intra. L. Rev. 41 (1968).

§ 25-1-207. Performance or acceptance under reservation of rights.

Reservation of Right to Collect Remainder of Unpaid Account. — Where debtor pays thirty-five percent of an account with checks bearing on the face of one the words "first instalment of agreed settlement" and on the other "final instalment of agreed settlement,"

the creditor reserves its right to collect the remainder of the unpaid account when it indorses the checks "with reservation of all our rights." *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

§ 25-1-208. Option to accelerate at will.

Editor's Note. — For a note on the operation of a due-on-sale clause in a deed of trust to allow a lender to exact higher interest rates from the grantee of a mortgagor, see 13 Wake Forest L. Rev. 490 (1977).

"Good Faith" Standard Applicable Only to Insecurity Clauses. — This section imposes the "good faith" standard in § 25-1-201(19) only on insecurity-type clauses. *Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 224 S.E.2d 580 (1976).

Insecurity and Default Clauses Distinguished. — Insecurity-type clauses are clearly distinguished from default-type clauses where the right to accelerate is conditioned upon the occurrence of a condition which is within the control of the debtor. *Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 224 S.E.2d 580 (1976).

§ 25-1-209. Subordinated obligations. — An obligation may be issued as subordinated to payment of another obligation of the person obligated, or a creditor may subordinate his right to payment of an obligation by agreement with either the person obligated or another creditor of the person obligated. Such a subordination does not create a security interest as against either the common debtor or a subordinated creditor. This section shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it. (1967, c. 562, s. 1.)

Editor's Note. — Section 10 of Session Laws 1967, c. 562, makes the act effective at midnight on June 30, 1967. See Editor's note to § 25-1-201.

ARTICLE 2.

Sales.

PART 1.

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER.

§ 25-2-101. Short title.

Editor's Note. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

For note on "Products Liability — Sales Warranties of the Uniform Commercial Code," see 46 N.C.L. Rev. 451 (1968).

§ 25-2-102. Scope; certain security and other transactions excluded from this article.

Editor's Note. — For survey of 1974 case law on the applicability of the Uniform Commercial Code to the sale of a business, see 53 N.C.L. Rev. 1097 (1975).

Applied in HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974); North Carolina Nat'l Bank v. Holshouser, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

§ 25-2-103. Definitions and index of definitions.

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975); Harrington Mfg. Co. v.

Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282 (1979).

§ 25-2-104. Definitions: "Merchant"; "between merchants"; "financing agency."

Editor's Note. — For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977). For survey of 1977 commercial law, see 56 N.C. L. Rev. 915 (1978).

"Farmer" as "Merchant" Matter for Proof. — Since the growing and marketing of corn and soybeans is an important part of the agricultural economy of the area, and the procedures for marketing these crops are well known, it cannot be said that a particular "farmer," or a grower, is not a "merchant" within the code definition, but rather is a matter for proof. *Currituck Grain, Inc. v. Powell*, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

Evidence Sufficient to Support Finding that Farmer Was "Merchant". — The evidence that the defendant was a farmer raising corn and soybeans was sufficient to support a jury's

finding that the defendant by his occupation held himself out as having knowledge or skill peculiar to corn and soybeans. This would put him within the statutory definition of merchant. There also was sufficient evidence to support a jury's finding that the defendant by his occupation held himself out as having knowledge or skill peculiar to the practice of dealing in corn and soybeans which would also put him within the statutory definition of merchant. *Currituck Grain, Inc. v. Powell*, 38 N.C. App. 7, 246 S.E.2d 853 (1978).

Applied in *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975); *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976); *Batiste v. American Home Prods. Corp.*, 32 N.C. App. 1, 231 S.E.2d 269 (1977); *Reid v. Eckerd Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344 (1979).

§ 25-2-105. Definitions: Transferability; "goods"; "future" goods; "lot"; "commercial unit."

Editor's Note. — For note discussing liquidated damages, specific performance and

other remedies for breach of cotton sales contracts, see 53 N.C.L. Rev. 579 (1974). For

survey of 1974 case law on the applicability of the Uniform Commercial Code to the sale of a business, see 53 N.C.L. Rev. 1097 (1975).

Applied in *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975).

Quoted in *Currituck Grain, Inc. v. Powell*, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

Cited in *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

§ 25-2-106. Definitions: "Contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming" to contract; "termination"; "cancellation." — (1) In this article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (§ 25-2-401). A "present sale" means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance. (1965, c. 700, s. 1; 1967, c. 24, s. 6.)

Editor's Note. —

The 1967 amendment, originally effective Oct. 1, 1967, substituted "any remedy for breach" for "remedy any breach" in subsection (4). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

Existence of Warranties as Showing Standard for Conformity. — The existence of any express or implied warranties would be relevant to show the standard to which the goods

were supposed to conform. *Harrington Mfg. Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282 (1979).

Applied in *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972); *Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975); *Batiste v. American Home Prods. Corp.*, 32 N.C. App. 1, 231 S.E.2d 269 (1977); *North Carolina Nat'l Bank v. Holshouser*, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

§ 25-2-107. Goods to be severed from realty; recording. — (1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third-party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale. (1965, c. 700, s. 1; 1975, c. 862, s. 4.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, substituted "sale of minerals or the like (including oil and gas)" for "sale of timber, minerals or the like" near the

beginning of subsection (1) and inserted "or of timber to be cut" near the middle of subsection (2).

PART 2.

FORM, FORMATION AND READJUSTMENT OF CONTRACT.

§ 25-2-201. Formal requirements; statute of frauds.

Editor's Note. — For article on statute of frauds as to personal property under the Uniform Commercial Code, see 4 Wake Forest Intra. L. Rev. 41 (1968).

Nonmerchant who signs nothing ordinarily will not be bound to a contract under the statute of frauds provision of this section. *Currituck Grain, Inc. v. Powell*, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

Invoices sent from one party to the other constitute writings "sufficient to indicate that a contract for sale has been made between the parties," within the meaning of this section. *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 285 N.C. 344, 204 S.E.2d 834 (1974).

Insufficient Writings. — Documents relied upon by plaintiff, who furnished material to builder, and signed by defendant for whom home was being constructed did not make out an enforceable contract under this section. *Lowe's Cos. v. Lipe*, 20 N.C. App. 106, 201 S.E.2d 81 (1973).

Statute Not Defense for Merchant. — If a merchant receives a written confirmation sufficient as against the sender and fails to give written notice within 10 days, the statute of frauds would not be a defense. *Currituck Grain,*

Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

"Farmer" as "Merchant" Matter for Proof. — Since the growing and marketing of corn and soybeans is an important part of the agricultural economy of the area, and the procedures for marketing these crops are well known, it cannot be said that a particular "farmer," or a grower, is not a "merchant" within the code definition, but rather is a matter for proof. *Currituck Grain, Inc. v. Powell*, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

Oral Contract Made by Telephone for Sale of Yarn. — Evidence of both parties showed that a complete and valid oral contract for the sale of yarn was made by telephone, such oral contract being valid and enforceable since each party admitted "in his pleading, testimony or otherwise in court that a contract of sale was made." *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 285 N.C. 344, 204 S.E.2d 834 (1974).

Applied in *Harwell Enterprises v. Stevens*, 9 N.C. App. 228, 175 S.E.2d 739 (1970).

Quoted in *Currituck Grain, Inc. v. Powell*, 38 N.C. App. 7, 246 S.E.2d 853 (1978).

Cited in *Grissett v. Ward*, 10 N.C. App. 685, 179 S.E.2d 867 (1971).

§ 25-2-202. Final written expression; parol or extrinsic evidence.

Evidence of Additional Consistent Terms. — A security agreement in which the buyer of a mobile home acknowledged delivery of the mobile home "in good condition and repair" was not intended as a complete and exclusive statement of the terms of the agreement within the meaning of paragraph (b) of this section and the buyer's testimony with respect to the defective condition of the mobile home after it was installed was competent as evidence of additional consistent terms of the sale, where the evidence of both parties showed that the mobile home was to be delivered and set up on defendant's lot and where the security agreement was signed by the buyer before the

mobile home was delivered and installed. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Parol Evidence as to Lease-Purchase Agreement. — Under paragraph (a), parol evidence raised by operation of a course of performance may be used in order to help explain and supplement a particular lease-purchase agreement. *Robinson v. Branch Moving & Storage Co.*, 28 N.C. App. 244, 221 S.E.2d 81 (1976).

Cited in *Recreatives, Inc. v. Travel-On Motorcycles Co.*, 29 N.C. App. 727, 225 S.E.2d 637 (1976).

§ 25-2-203. Seals inoperative.

Applied in *North Carolina Nat'l Bank v. Holshouser*, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

Cited in *Mobil Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E.2d 809 (1979).

§ 25-2-204. Formation in general.

Editor's Note. — For note on "Meeting of the Minds and U.C.C. § 2-204," see 46 N.C.L. Rev. 637 (1968).

§ 25-2-207. Additional terms in acceptance or confirmation.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(1967, c. 562, s. 1.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, deleted "or different" following "additional" near the beginning of subsection (2). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

Invoices sent from one party to the other constituted a "written confirmation" of a previously made oral contract for sale, within the meaning of this section. *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 285 N.C. 344, 204 S.E.2d 834 (1974).

Inclusion of Term Not Previously Agreed upon Constitutes Proposal for Addition. — When one party to a valid oral contract for the sale of goods, within a reasonable time after the making of such contract, sends to the other party a document purporting to set out in writing the terms of the contract and includes therein a term not previously agreed upon, this constitutes a proposal for an addition to the contract. *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 285 N.C. 344, 204 S.E.2d 834 (1974).

Which May Become Part of Contract Unless Materially Altering It. — When the parties to the contract are "merchants," as that term is defined in § 25-2-104(1), all proposed additional terms, to which the other party does not object in due time, become part of the contract, unless "they materially alter it." *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 285 N.C. 344, 204 S.E.2d 834 (1974).

An addition to an oral contract inserting an "arbitration only" term was a material alteration of the contract, and could not be

deemed incorporated into the contract for sale by reason of the mere silence of one party following its receipt of the other party's invoices containing the term. *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 285 N.C. 344, 204 S.E.2d 834 (1974); *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135 (4th Cir. 1979).

An arbitration clause was such a material alteration of plaintiff's oral contract of purchase that it did not become binding on the plaintiff who never recognized, acknowledged or signed an agreement that its oral contract should be so amended or modified. *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 463 F. Supp. 177 (E.D.N.C. 1978).

There is no conflict between 9 U.S.C. § 2, which provides for the validity and enforceability of arbitration clauses in contracts evidencing transactions in interstate commerce, and the decisional law of North Carolina holding an arbitration clause to be a per se material alteration under this section. *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135 (4th Cir. 1979).

"Yarn Contracts" Attempting to Attach Additional Terms to Oral Contracts. — Where defendant's "yarn contracts" served not only to confirm oral telephone contracts between the parties but also attempted to attach additional terms to the agreement, to allow additional terms, which were material alterations, under the guise of "confirmation of the contract" would render this section meaningless. *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 19 N.C. App. 678, 200 S.E.2d 668, aff'd, 285 N.C. 344, 204 S.E.2d 834 (1974).

§ 25-2-208. Course of performance or practical construction.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (§ 25-1-205). (1967, c. 24, s. 7.)

Editor's Note. —

The 1967 amendment, originally effective Oct. 1, 1967, corrected the reference at the end of subsection (2). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

Fact that exclusion of warranty raised by parties' course of performance is oral does not vitiate its utility or relevance. Robinson v.

Branch Moving & Storage Co., 28 N.C. App. 244, 221 S.E.2d 81 (1976).

Parol Evidence as to Lease-Purchase Agreement. — Under § 25-2-202(a), parol evidence raised by operation of a course of performance may be used in order to help explain and supplement a particular lease-purchase agreement. Robinson v. Branch Moving & Storage Co., 28 N.C. App. 244, 221 S.E.2d 81 (1976).

§ 25-2-210. Delegation of performance; assignment of rights.

Stated in Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

PART 3.**GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT.****§ 25-2-301. General obligations of parties.****Prima Facie Case Presents Jury Question. —**

A seller's allegation of the sale and delivery of goods at an agreed price, and buyer's admission that he purchased the goods, executed the note and security agreement, and refused to pay a portion of the purchase price agreed upon, makes out a prima facie case entitling seller to

go to the jury and, nothing else appearing, to recover the balance due on the note. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

Cited in American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

§ 25-2-302. Unconscionable contract or clause. — (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination. (1971, c. 1055, s. 1.)

Editor's Note. — Session Laws 1971, c. 1055, s. 3, provides: "This act shall be in full force and effect on and after October 1, 1971, and apply to transactions entered into and events occurring on and after that date."

For note on strict liability for breach of

warranty, see 50 N.C.L. Rev. 697 (1972).

Under subsection (1) determination of unconscionability is a question of law for the court. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

§ 25-2-309. Absence of specific time provisions; notice of termination.

Applied in *Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975).

§ 25-2-313. Express warranties by affirmation, promise, description, sample.

Editor's Note. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972). For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

Prior law is in accord with this section with respect to the creation of express warranties. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Subsections (1)(a) and (2) work no change in the pre-code law of North Carolina. *Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 467 F.2d 588 (4th Cir. 1972).

Only a person in privity with the warrantor may recover on the express warranty for mechanical devices. *Kinlaw v. Long Mfg. N.C., Inc.*, 40 N.C. App. 641, 253 S.E.2d 629 (1979).

Statement Held Mere Opinion. — Seller's statement that a mobile home "was supposed to last a lifetime and be in perfect condition" is

merely an expression of opinion and does not create an express warranty. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Applied in *Helson's Premiums & Gifts, Inc. v. Duncan*, 9 N.C. App. 653, 177 S.E.2d 428 (1970); *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974); *Potter v. Tyndall*, 22 N.C. App. 129, 205 S.E.2d 808 (1974); *Hobson Constr. Co. v. Hajoca Corp.*, 28 N.C. App. 684, 222 S.E.2d 709 (1976); *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976); *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Quoted in *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976).

Cited in *Harrington Mfg. Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282 (1979).

§ 25-2-314. Implied warranty: Merchantability; usage of trade.

Editor's Note. — For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973). For survey of 1972 case law on recovery for personal injury under implied warranty, see 51 N.C.L. Rev. 1159 (1973). For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977). For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

This section accords with prior law. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

The requirements of "merchantability" spelled out in detail in subsection (2) include the prior case law definition that the personal property must be reasonably fit for the purposes for which sold. *Rodd v. W.H. King Drug Co.*, 30 N.C. App. 564, 228 S.E.2d 35 (1976).

Section Restricts Application of Doctrine of Caveat Emptor. — The common-law doctrine of caveat emptor historically applied to sales of both real and personal property. Its application to personal property sales, however, has been restricted by this section. *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975).

Warranties arise under the Uniform Commercial Code only upon a sale of goods.

Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Sale by Merchant Gives Rise to Warranty. — Where seller was a merchant with respect to the sale of mobile homes, and the security agreement executed by buyer contained no language, as permitted by § 25-2-316, excluding or modifying the implied warranty of merchantability, the sale carried with it an implied warranty that the mobile home was fit for the residential purposes for which such goods are ordinarily used. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Completed Delivery Constitutes Sale. — If there has been a completed delivery by the seller, the sale has been consummated and implied warranties arise under this section. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

The implied warranty of merchantability applies equally to both the retailer and the manufacturer of goods. *Gillispie v. Thomasville Coca-Cola Bottling Co.*, 17 N.C. App. 545, 195 S.E.2d 45, cert. denied, 283 N.C. 393, 196 S.E.2d 275 (1973).

But Not to One Who Merely Allows Seal of Inspection to Be Placed on Product. — This

section and § 25-2-315 are not applicable to one that simply allows its seal of inspection to be placed on a product manufactured by someone else. Any implied warranty in such a case would concern the quality of inspection services rather than the quality of goods. *Jones v. Clark*, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

Physician Issuing Prescription Not a "Seller". — The physician who issues a prescription for an oral contraceptive drug is not a "seller" within the meaning of this section and the issuance of the prescription does not constitute passing title. *Batiste v. American Home Prods. Corp.*, 32 N.C. App. 1, 231 S.E.2d 269, cert. denied, 292 N.C. 466, 233 S.E.2d 466 (1977).

State and Federal Regulatory Acts Aid in Assessing Merchantability. — In assessing the merchantability of goods under subsections (2)(a) through (f), various state and federal regulatory acts are instructive. This is especially pertinent in regard to a determination of merchantability under subsection (2)(a) and (c). *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976).

Disclaimer and Substitution of § 25-2-719 (1)(a) Limitations. — A merchant seller may disclaim all liability under § 25-2-316(2) stemming from any breach of warranties of merchantability and fitness under § 25-2-315 and this section, substituting in place thereof the limitations of § 25-2-719(1)(a). *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976).

Strict Liability in Tort Compared. — Strict liability in tort is a substantially more narrow basis of liability than breach of implied warranty of merchantability under subsection (1). *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976).

The action for breach of the implied warranty of merchantability is akin to the action of strict liability in tort, except that proof of negligence and foreseeability of injury are not required. It is also akin to a contract action, except that privity requirements have become considerably more relaxed by the various courts in recent years and, further, affirmative defenses of disclaimer and failure to give timely notice may be asserted by the seller. *Reid v. Eckerd's Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344 (1979).

What Plaintiff Must Show. — In its pure form, an action for breach of implied warranty of merchantability under this section entitles a plaintiff to recover without any proof of negligence on a defendant's part where it is shown that (1) a merchant sold goods, (2) the goods were not "merchantable" at the time of sale, (3) the plaintiff (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave

timely notice to the seller. *Reid v. Eckerd's Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344 (1979).

Damages for Breach. — Where there is breach of the implied warranty of merchantability the Uniform Commercial Code provides for recovery by the buyer of both "general" damages, which are implied by law, and "special" damages, which arise from the special circumstances of the case and must be properly pleaded. *Rodd v. W.H. King Drug Co.*, 30 N.C. App. 564, 228 S.E.2d 35 (1976).

Extent of Warranty of Fitness. — The warranty of fitness, either express or implied, is contractual and the contract extends no further than the parties to it and their privies. Privity to the contract is the basis of liability. *Gillispie v. Thomasville Coca-Cola Bottling Co.*, 17 N.C. App. 545, 195 S.E.2d 45, cert. denied, 283 N.C. 393, 196 S.E.2d 275 (1973).

Pre-Code Warranty Excluded Containers. — Before adoption of the Uniform Commercial Code an implied warranty of fitness did not extend to a container in which a product came from the producer. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Code Extends Implied Warranty to Include Containers. — An implied warranty of fitness has been extended by the Uniform Commercial Code to include a product's container. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

And Injury Caused by Container Constitutes Breach. — The fact that it is the container, rather than the product inside, which causes injury, does not make the injury any less a result of the seller's breach of warranty. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Under this section, soft drinks are not merchantable if inadequately contained. If they are sold in a container which is inadequate, the seller has breached his implied warranty of merchantability and he is liable for personal injury proximately caused by this breach. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

The instructions accompanying product may be integral part of warranty. *Reid v. Eckerd's Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344 (1979).

Failure to Warn of Dangerous Propensities May Render Product Unmerchantable. — When an aerosol deodorant can is viewed holistically, and especially where dangerous propensities under specified conditions inhere to both container and contents as well as their several interfaces, a failure to adequately warn of all such propensities may, in a proper case, render a product unmerchantable under subdivisions (2)(c), (e) and (f) of this section and provide grounds for an action to recover damages for breach of the implied warranty of

merchantability embodied in subsection (1) of this section. *Reid v. Eckerd's Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344 (1979).

Breach of Warranty as to Aerosol Deodorant. — Where an aerosol can of deodorant was being used for its intended purposes in a normal way, the expectation of the consumer that the product if used according to furnished instructions, would not injure him was found to lie within the warranty of fitness for ordinary purposes of subdivision (2)(c) of this section. *Reid v. Eckerd's Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344 (1979).

Where the plaintiff used an aerosol can of deodorant in accordance with its directions and warnings, set the can down, walked across the room and lit his cigarette, simultaneously igniting the alcohol in the deodorant he had applied to himself, his cause of action, contending that he was given insufficient notice of the natural propensities of the product as it was constituted and that the label contained insufficient data from which he reasonably could have inferred any danger of what in fact occurred, was cognizable under a theory of breach of the implied warranty of merchantability under this section. *Reid v. Eckerd's Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344 (1979).

Proof of compliance with government standards is no bar to recovery on a breach of warranty theory. Although such evidence may well be pertinent to the issue of the existence of a breach of any warranty, it is not conclusive. *Reid v. Eckerd's Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344 (1979).

Where a grantor conveys land subject to restrictive covenants that limit its use to the construction of a single-family dwelling, and, due to subsequent disclosures, both unknown to and not reasonably discoverable by the grantee before or at the time of conveyance, the property cannot be used by the grantee, or by any subsequent grantees through mesne conveyances, for the specific purpose to which its use is limited by the restrictive covenants, the grantor breaches an implied warranty arising out of said restrictive covenants. *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975).

Distributor Must Disclose Limitation on Warranty. — Where the manufacturer gave ample warning to the distributor who failed to pass it on to the consumer, and the distributor selected the product, unqualifiedly recommended it, and sold it for immediate use, then in the absence of express warranty on the part of the manufacturer, the implied warranty of limited fitness between the manufacturer and the distributor placed the primary responsibility on the distributor to notify the user of the limitation on fitness. *Wilson v. E-Z Flo Chem. Co.*, 281 N.C. 506, 189 S.E.2d 221 (1972).

Retailer Liable for Breach May Recover from Manufacturer. — Where the retailer purchases personal property from the manufacturer or wholesaler for resale with implied or express warranty of fitness and the retailer resells to the consumer with the same warranty and the retailer has been compelled to pay for breach of warranty, he may recover his entire loss from the manufacturer. This rule is not applicable between the manufacturer who gave warning and the distributor who has been warned, but fails to pass on the warning to the user. *Wilson v. E-Z Flo Chem. Co.*, 281 N.C. 506, 189 S.E.2d 221 (1972).

Where the retailer purchases personal property from the manufacturer for resale with implied or express warranty of fitness and the retailer resells to the consumer with the same warranty and the retailer has been compelled to pay for breach of warranty, he may recover his entire loss from the manufacturer. *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 253 S.E.2d 277 (1979).

Acceptance of Product Held Not to Bar Action. — While the purchaser of a mobile home was obligated to pay the contract price when she paid the loan on the home and released the lender, thereby accepting the home and barring rejection, she could still maintain an action for breach of warranty. *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 253 S.E.2d 277 (1979).

Merchantability Held Question for Jury. — Whether an aerosol can of deodorant, when viewed as a whole (including contents, packaging, labeling and warnings) was merchantable was a jury question not susceptible of summary adjudication on the basis of the labeling of the product. *Reid v. Eckerd's Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344 (1979).

A defendant is entitled to have his counterclaim, based upon a breach of implied warranty of merchantability, submitted to a jury unless the contract contains an exclusion or modification of the implied warranty. *Trio Estates, Ltd. v. Dyson*, 10 N.C. App. 375, 178 S.E.2d 778 (1971).

Burden of Proof. — In order to effectively assert a claim under this section, the plaintiff must prove the giving of the warranty, the breach of that warranty, and damages resulting to him as a proximate result of the breach. *Burbage v. Atlantic Mobilehome Suppliers Corp.*, 21 N.C. App. 615, 205 S.E.2d 622 (1974).

The burden is upon the buyer to establish a breach by the seller of the warranty of merchantability; that is, to show that the defect existed at the time of the sale. *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975).

Applied in *Hobson Constr. Co. v. Hajoca Corp.*, 28 N.C. App. 684, 222 S.E.2d 709 (1976).

§ 25-2-315. Implied warranty: Fitness for particular purpose.

Editor's Note. — For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

This section did not repeal or limit the scope of former § 106-50.7(e)(4), since § 25-2-102 provides that the Uniform Commercial Code does not "impair or repeal any statute regulating sales to . . . farmers." Potter v. Tyndall, 22 N.C. App. 129, 205 S.E.2d 808, cert. denied, 285 N.C. 661, 207 S.E.2d 762 (1974).

This section and § 25-2-314 are not applicable to one that simply allows its seal of inspection to be placed on a product manufactured by someone else. Any implied warranty in such a case would concern the quality of inspection services rather than the quality of goods. Jones v. Clark, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

Distributor Must Disclose Limitation on Warranty. — Where the manufacturer gave ample warning to the distributor who failed to pass it on to the consumer, and the distributor selected the product, unqualifiedly recommended it, and sold it for immediate use, then in the absence of express warranty on the part of the manufacturer, the implied warranty of limited fitness between the manufacturer and the distributor placed the primary responsibility on the distributor to notify the user of the limitation on fitness. Wilson v. E-Z Flo Chem. Co., 281 N.C. 506, 189 S.E.2d 221 (1972).

Disclaimer and Substitution of § 25-2-719(1)(a) Limitations. — A merchant seller may disclaim all liability under § 25-2-316(2) stemming from any breach of warranties of merchantability and fitness under § 25-2-314 and this section, substituting in place thereof the limitations of § 25-2-719(1)(a). Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

Acceptance of Product Held Not to Bar Action. — While the purchaser of a mobile home was obligated to pay the contract price when she

paid the loan on the home and released the lender, thereby accepting the home and barring rejection, she could still maintain an action for breach of warranty. Lyon v. Shelter Resources Corp., 40 N.C. App. 557, 253 S.E.2d 277 (1979).

Retailer Liable for Breach May Recover from Manufacturer. — Where the retailer purchases personal property from the manufacturer or wholesaler for resale with implied or express warranty of fitness and the retailer resells to the consumer with the same warranty and the retailer has been compelled to pay for breach of warranty, he may recover his entire loss from the manufacturer. This rule is not applicable between the manufacturer who gave warning and the distributor who has been warned, but fails to pass on the warning to the user. Wilson v. E-Z Flo Chem. Co., 281 N.C. 506, 189 S.E.2d 221 (1972).

Where the retailer purchases personal property from the manufacturer for resale with implied or express warranty of fitness and the retailer resells to the consumer with the same warranty and the retailer has been compelled to pay for breach of warranty, he may recover his entire loss from the manufacturer. Lyon v. Shelter Resources Corp., 40 N.C. App. 557, 253 S.E.2d 277 (1979).

Evidence of Damages Insufficient. — A warranty action failed for lack of evidence of damages proximately resulting from defects at the time of sale some 17 months and 30,000 miles earlier. Cooper v. Mason, 14 N.C. App. 472, 188 S.E.2d 653 (1972).

For a case involving the sale of prescription drugs, i.e., birth control pills, as it relates to this section, see Batiste v. American Home Prods. Corp., 32 N.C. App. 1, 231 S.E.2d 269, cert. denied, 292 N.C. 466, 233 S.E.2d 921 (1977).

Applied in Trio Estates, Ltd. v. Dyson, 10 N.C. App. 375, 178 S.E.2d 778 (1971); Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976).

Cited in Styron v. Loman-Garrett Supply Co., 6 N.C. App. 675, 171 S.E.2d 41 (1969).

§ 25-2-316. Exclusion or modification of warranties.

Editor's Note. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972). For survey of 1972 case law on recovery for personal injury under implied warranty, see 51 N.C.L. Rev. 1159 (1973). For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973). For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

This section is not in conflict with the provisions of the North Carolina Seed Law relating to labeled seed. Billings v. Joseph Harris Co., 290 N.C. 502, 226 S.E.2d 321 (1976).

To be valid under this section, disclaimer provision must be stated in express terms, mention "merchantability" in order to disclaim the implied warranty of merchantability, and be conspicuously displayed. Billings v. Joseph

Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

Buyer's Inspection Is Not Limited to Goods on Seller's Premises. — The principle in subsection (3)(b) of this section is not applicable where the contract of sale imposed on the seller the obligation to deliver a mobile home and block it on buyer's lot. Until that was properly done, fitness or unfitness for use as a home could not be ascertained by the buyer's examination and inspection of the goods on the seller's premises. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Provision Meeting Requirements of Subsection (2). — A provision which disclaims all other warranties, express and implied meets the requirements of subsection (2) where it was in writing, the implied warranty of merchantability was mentioned, and the exclusion was conspicuous as defined in § 25-1-201(10). *Bulliner v. GMC*, 54 F.R.D. 479 (E.D.N.C. 1971).

Fact that exclusion of warranty raised by parties' course of performance is oral does not vitiate its utility or relevance. *Robinson v. Branch Moving & Storage Co.*, 28 N.C. App. 244, 221 S.E.2d 81 (1976).

Disclaimer and Substitution of § 25-2-719(1)(a) Limitations. — A merchant seller may disclaim all liability under subsection (2) stemming from any breach of warranties of merchantability and fitness under §§ 25-2-314

and 25-2-315, substituting in place thereof the limitations of § 25-2-719(1)(a). *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

A defendant is entitled to have his counterclaim, based upon a breach of implied warranty of merchantability, submitted to a jury unless the contract contains an exclusion or modification of the implied warranty. *Trio Estates, Ltd. v. Dyson*, 10 N.C. App. 375, 178 S.E.2d 778 (1971).

Applied in *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972); *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975); *General Elec. Co. v. Pennell*, 31 N.C. App. 510, 229 S.E.2d 713 (1976); *Bentley Mach., Inc. v. Pons Hosiery, Inc.*, 33 N.C. App. 482, 235 S.E.2d 790 (1977).

Cited in *Gillisipie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972); *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976); *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976); *Rodd v. W.H. King Drug Co.*, 30 N.C. App. 564, 228 S.E.2d 35 (1976); *Batiste v. American Home Prods. Corp.*, 32 N.C. App. 1, 231 S.E.2d 269 (1977); *Isaacson v. Toyota Motor Sales, U.S.A., Inc.*, 438 F. Supp. 1 (E.D.N.C. 1976); *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 245 S.E.2d 801 (1978); *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 253 S.E.2d 277 (1979).

§ 25-2-317. Cumulation and conflict of warranties express or implied.

Express Warranty by Manufacturer Does Not Exclude Implied Warranty by Retailer. — This section provides that warranties, express and implied, should be construed as consistent with each other and as cumulative. Thus, if the

manufacturer of a mobile home had given an express warranty, it would not necessarily exclude an implied warranty given by the retailer. *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 253 S.E.2d 277 (1979).

§ 25-2-318. Third party beneficiaries of warranties express or implied.

Editor's Note. — For comment on implied warranty of fitness, see 4 *Wake Forest Intra. L. Rev.* 169 (1968). For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 *N.C.L. Rev.* 786 (1973). For survey of 1972 case law on recovery for personal injury under implied warranty, see 51 *N.C.L. Rev.* 1159 (1973).

General Rule Is that Only Person in Privity May Recover. — Subject to some exceptions, it is the general rule that only a person in privity with the warrantor may recover on the warranty. *Williams v. GMC*, 19 N.C. App. 337, 198 S.E.2d 766, cert. denied, 284 N.C. 258, 200 S.E.2d 659 (1973).

As a general rule, one seeking to recover on an implied warranty is still required to prove privity

of contract. This privity requirement has been relaxed in cases involving the sale of goods by this section. However, this relaxation of the privity requirement has not yet been extended to services. *Jones v. Clark*, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

And Plaintiff Must Be Person to Whom Section Extends Warranties. — There can be no recovery by implied warranty where the plaintiff is not one of those persons to whom the implied warranties extend by this section. *Williams v. GMC*, 19 N.C. App. 337, 198 S.E.2d 766, cert. denied, 284 N.C. 258, 200 S.E.2d 659 (1973).

Plaintiff could not take advantage of any warranties implied by the Uniform Commercial Code where her evidence showed that she was not a member of the family or household or a

guest in the home of the buyer so as to escape the privity requirement. *Williams v. GMC*, 19 N.C. App. 337, 198 S.E.2d 766, cert. denied, 284 N.C. 258, 200 S.E.2d 659 (1973).

Applied in *Reid v. Eckerd's Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344 (1979).

§ 25-2-326. Sale on approval and sale or return; consignment sales and rights of creditors.

Editor's Note. — For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

Purpose. — The purpose of this section is to protect innocent creditors from deception by ostensible ownership. *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976).

Parol evidence cannot be introduced to engraft an "or return" consignment provision onto a paper writing. *Recreatives, Inc. v. Travel-On Motorcycles Co.*, 29 N.C. App. 727, 225 S.E.2d 637 (1976).

PART 4.

TITLE, CREDITORS AND GOOD FAITH PURCHASES.

§ 25-2-401. Passing of title; reservation for security; limited application of this section.

Concept of Title Abandoned. — The most basic departure from previous law which is found in the Uniform Commercial Code is the abandonment of the concept of title as a tool for resolving sales problems. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970); *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Completed Delivery Consummates Sale. — If there has been a completed delivery by the seller, the sale has been consummated and implied warranties arise under § 25-2-314. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Time of Payment Does Not Determine Time of Sale. — Under subsection (2) the time of payment is not determinative of the question of when a sale takes place. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Possession of Product in Self-Service Store Constitutes Sale. — The presence of soft drinks on the shelves of a self-service store constituted an offer for sale and delivery at a stated price; a sale occurred when the purchaser took the drinks into his possession with the intention of paying for them at the cashier's counter. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

And Seller Retains a Security Interest. — As long as a purchaser in a self-service store has a product in his possession, intending to pay for it, he has title to the product, and the seller's interest at that point is not "title" but a security interest to enforce payment; when the purchaser

changes his mind and returns to the shelf a product which he has picked up with the intention of buying it, title is revested in the seller. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Effect of Right to Return. — Under subsection (4) a right to return delivered goods to the seller does not necessarily delay passage of the title until that right has expired. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Effect of Reservation of Title by Seller. — Where there has been "delivery to the buyer," a reservation of title by the seller, by express provision of the Code, is "limited in effect to a reservation of a security interest." *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

Interpretation of UCC Where Public Regulation Involved. — The official comment to this section seems to say that the Uniform Commercial Code makes no attempt to set out a specific line of interpretation where a public regulation is involved, but that in case a court should decide to apply this private law definition and reasoning to its public regulation, that there should be a clear and concise definitional basis for so doing. Such comment leads to the conclusion that the sales act, a private law, is not necessarily applicable to public regulations unless the court chooses to make it so. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

Transfer of Ownership of Motor Vehicle. — The provisions of § 20-72(b) contain specific,

definite and comprehensive terms concerning the transfer of ownership of a motor vehicle. Conversely, the Uniform Commercial Code does not refer to transfer of ownership of motor vehicles, but only refers to the passing of title to property generally described as "goods." Although the word "automobile" comes within the general term of "goods," automobiles are a special class of goods which have long been heavily regulated by public regulatory acts. Section 20-72(b) is a special statute and the Uniform Commercial Code is a general statute. Thus, the special statute, even though earlier in point of time, must prevail. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

The documents of title referred to in this section do not include certificates of title to motor vehicles. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

The provisions of the Uniform Commercial Code do not override the earlier motor vehicle statutes relating to the transfer of ownership of motor vehicle for the purpose of tort law and liability insurance coverage. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

§ 25-2-402. Rights of seller's creditors against sold goods.

Editor's Note. — For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

§ 25-2-403. Power to transfer; good faith purchase of goods; "entrusting."

Editor's Note. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

"Good faith" in the context of this section means "honesty in fact" in the transaction involved. *Landrum v. Armbruster*, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

The basic predicate for the operation of subsection (1) of this section is title, either actual or voidable, in the transferee. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

And Unauthorized Transfer by Bailee Will Not Divest Bailor of Title. — In the absence of grounds for an estoppel and except as provided in subsection (2) of this section or § 25-2-401, no right, title, or interest may be acquired as the result of an unauthorized or wrongful sale, gift, exchange, pledge, mortgage, or other transfer of property by a bailee in possession, even though to an innocent purchaser. The bailor is not divested of his title by such an unauthorized act and may recover the property or its value from the vendee or transferee in any appropriate

Section Controls as to Aircraft. — There is no statute applicable particularly to aircraft, but this section, which is applicable to sales of "goods" generally, is controlling. *Norris v. Insurance Co. of North America*, 26 N.C. App. 91, 215 S.E.2d 379, cert. denied, 288 N.C. 242, 217 S.E.2d 666 (1975).

Effect of Wrongful Transfer of Property by Bailee in Possession. — In the absence of grounds for an estoppel and except as provided in § 25-2-403(2) or this section, no right, title, or interest may be acquired as the result of an unauthorized or wrongful sale, gift, exchange, pledge, mortgage, or other transfer of property by a bailee in possession, even though to an innocent purchaser. The bailor is not divested of his title by such an unauthorized act and may recover the property or its value from the vendee or transferee in any appropriate form of action. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

Applied in Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); *North Carolina Nat'l Bank v. Holshouser*, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

form of action. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

Where an entrustment does not qualify under subsection (2) of this section, pre-code law will be applicable in determining the rights of the parties. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

For subsection (2) to be applicable, there must be three essential steps: (1) an entrustment of goods to (2) a merchant who deals in goods of that kind followed by a sale by such merchant to (3) a buyer in ordinary course of business. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

The phrase "deals in goods" in subsection (2) of this section is to be construed as one who is engaged regularly in selling goods of the kind. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

"Buyer in Ordinary Course of Business." — A company is not a "buyer in ordinary course of business," a purchaser who "bought goods in the open market," if it did not acquire possession of the goods as a purchaser in the ordinary

course of business but received those goods in its capacity of a textile finisher, for the specific purpose of processing them on behalf of the owner. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

Buyer with Voidable Title Can Transfer Better Title Than He Had. — While the buyer might have had a voidable title if he had made fraudulent representations of solvency, one with voidable title can transfer better title than he had under this section. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

The holder of a perfected security interest in after acquired property is a "good faith purchaser" whose rights are superior to a seller of the after acquired goods under § 25-2-702(2), several commentators have concluded. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

Vendee Who Paid with Forged Check May Transfer Good Title. — Whether a check was a forgery, the transaction a cash sale or whether delivery was procured through fraud punishable as larcenous under the criminal law, contrary to the law as it may have been prior to the enactment of this section, the vendee in such a transaction may transfer a good title to a "good faith purchaser for value." *Lane v. Honeycutt*, 14 N.C. App. 436, 188 S.E.2d 604, cert. denied, 281 N.C. 622, 190 S.E.2d 466 (1972).

This section allows a person who has obtained delivery of goods under a transaction of purchase to transfer a good title to a "good faith purchaser for value" even though such person obtained delivery in exchange for a check which is later dishonored or procured the delivery through criminal fraud. *Landrum v. Armbruster*, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

Original Transferor Held Entitled to Follow Proceeds of Resale. — Where the trial court

found upon supporting evidence that original defendant paid for pigs purchased from plaintiff with a draft which was returned for insufficient funds, that additional defendants knew that original defendant had not paid plaintiff for the pigs and would not be able to do so and that plaintiff was seeking recovery of the purchase price or the pigs, and that the additional defendants were not purchasers of the pigs but acted as agent for the original defendant when they thereafter sold the pigs to third parties and applied the proceeds of the sale to debts owed by the original defendant to the additional defendants, the trial court properly held that title to the pigs remained in plaintiff, that plaintiff was entitled to follow the proceeds of the sale of the pigs, and that additional defendants were secondarily liable to plaintiff for the value of the pigs disposed of up to the balance of the purchase price due for the pigs. *Gus Z. Lancaster's Stock Yards, Inc. v. Williams*, 37 N.C. App. 698, 246 S.E.2d 823, cert. denied, 295 N.C. 738, 248 S.E.2d 863 (1978).

Burden of proof of transfer of good title rests upon party making later purchase. *Landrum v. Armbruster*, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

To prevail the subsequent purchaser must prove (1) that he was a purchaser, (2) that he purchased in good faith and (3) that he gave value. *Landrum v. Armbruster*, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

Failure to Raise Question of Applicability of Section in Trial Court. — The fact that the applicability of this section of the Uniform Commercial Code to a proceeding has not been brought to the attention of the district court on motion for judgment n.o.v. does not in all instances preclude appellate review. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. 1970).

PART 5.

PERFORMANCE.

§ 25-2-501. Insurable interest in goods; manner of identification of goods. — (1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

(1967, c. 24, s. 8.)

Editor's Note.—

The 1967 amendment, originally effective Oct. 1, 1967, inserted, in paragraph (c) of subsection (1), "after contracting or for the sale of crops to be harvested within twelve months." Session

Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

As the rest of the section was not changed by the amendment, only subsection (1) is set out.

§ 25-2-502. Buyer's right to goods on seller's insolvency.

Seller Must Become Insolvent within 10 Days after Receipt of First Installment of Purchase Price. — Presumably, a seller cannot become insolvent prior to the receipt of the first installment of the purchase price or 11 days after receipt of the first installment of the

purchase price or on the very date of its receipt. He has to become insolvent within the given 10-day period. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

§ 25-2-508. Cure by seller of improper tender or delivery; replacement.

Seller May Make Conforming Delivery Regardless of Prior Nonconforming Delivery. — It is clear from this section that the seller may at any time before the expiration of the time for performance make a conforming delivery regardless of a prior nonconforming delivery. *Meads v. Davis*, 22 N.C. App. 479, 206 S.E.2d 868 (1974).

Even Though Seller Knew Prior to Delivery that Goods Were Not in Conformity. — This section deals with the situation in which the seller knows prior to delivery that the goods are not in conformity, but has reason to believe that the buyer will accept. An example of such a situation might be where the buyer orders goods no longer carried by the seller, but the seller has

goods which will perform the same function. *Meads v. Davis*, 22 N.C. App. 479, 206 S.E.2d 868 (1974).

Buyer's Obligation Abrogated after "Reasonable Time." — Where defendants were not able to and did not make a conforming delivery within a "reasonable time" or within the "contract time," the plaintiff buyer had no further obligations to purchase or accept any mobile home from defendant, whether the original unit was in a repaired condition or was a replacement. *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Stated in Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

§ 25-2-510. Effect of breach on risk of loss.

Buyer Held Not Liable for Loss of Nonconforming Cable. — In an action to recover the sales price of nonconforming cable which was rejected by the buyer and which was stolen from the buyer's storage space three months after the buyer gave notice of rejection,

where the buyer did not contract to return the cable and was not negligent in storing it, the trial court properly concluded the buyer was not liable for the resulting loss. *Graybar Elec. Co. v. Shook*, 283 N.C. 213, 195 S.E.2d 514 (1973).

§ 25-2-511. Tender of payment by buyer; payment by check.

Applied in Berube v. Mobile Homes Sales & Serv., 28 N.C. App. 160, 220 S.E.2d 636 (1975).

§ 25-2-512. Payment by buyer before inspection.

Mere fact that plaintiff paid before delivery does not constitute acceptance of goods or impair buyer's right to inspect or any of his remedies. *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

A buyer's down payment on goods does not impair his right to inspect following delivery. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

§ 25-2-513. Buyer's right to inspection of goods.

Buyer Has Reasonable Time after Arrival to Inspect. — Unless otherwise agreed, when the seller is required to send the goods to the buyer, the inspection may be after their arrival, and the buyer is entitled to a reasonable time after the goods arrive at their final destination to inspect

and reject them if they do not comply with the contract. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Applied in *Graybar Elec. Co. v. Shook*, 17 N.C. App. 81, 193 S.E.2d 392 (1972), aff'd, 283 N.C. 213, 195 S.E.2d 514 (1973).

PART 6.

BREACH, REPUDIATION AND EXCUSE.

§ 25-2-601. Buyer's rights on improper delivery.

Applied in *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972); *Graybar Elec. Co. v. Shook*, 17 N.C. App. 81, 193 S.E.2d

392 (1972), aff'd, 283 N.C. 213, 195 S.E.2d 514 (1973); *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975).

§ 25-2-602. Manner and effect of rightful rejection.

The Uniform Commercial Code emphasizes promptness and good faith. *Graybar Elec. Co. v. Shook*, 283 N.C. 213, 195 S.E.2d 514 (1973).

A prospective purchaser may exercise a valid right to reject. *Graybar Elec. Co. v. Shook*, 283 N.C. 213, 195 S.E.2d 514 (1973).

And even if he takes possession, responsibility expires after a reasonable time in which the owner has opportunity to repossess. *Graybar Elec. Co. v. Shook*, 283 N.C. 213, 195 S.E.2d 514 (1973).

Acceptance precludes rejection of the goods accepted and, if made with knowledge of a nonconformity, cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

What Constitutes Effective Rejection. — Effective rejection means (1) rejection within a reasonable time after delivery or tender and (2) seasonable notice to the seller. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Buyer Not Liable for Rejected Goods Which Were Later Stolen. — In an action to recover the sales price of nonconforming cable which was rejected by the buyer and which was stolen from the buyer's storage space three months after the buyer gave notice of rejection, where the buyer did not contract to return the cable and was not negligent in storing it, the trial court properly concluded that the buyer was not liable for the resulting loss. *Graybar Elec. Co. v. Shook*, 283 N.C. 213, 195 S.E.2d 514 (1973).

Remaining in Mobile Home after Revocation or Rejection. — The fact that plaintiff stayed in a mobile home unit after allegedly revoking or rejecting the unit does not alone necessarily vitiate any of the buyer's rights. *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Finding of Revocation or Rejection Warrants Same Relief. — Any error committed by the district court in finding a rejection instead of a revocation of acceptance must be deemed harmless since evidence warranted a finding of

revocation. In either case the plaintiff's relief is the same. *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Recovery upon Revocation or Rejection. — If the buyer made an effective rejection of a mobile home, or justifiably revoked his acceptance of it, he has a right to recover "so much of the price as had been paid" plus any incidental and consequential damages he is able to prove. *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Evidence of Rejection Insufficient. — Buyer's evidence was insufficient to support a

finding that she rejected a mobile home where it showed that, after telling seller when the mobile home was installed that "this is not right and I do not want it," buyer moved into the mobile home and made three monthly payments under the terms of the contract. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Applied in *Graybar Elec. Co. v. Shook*, 17 N.C. App. 81, 193 S.E.2d 392 (1972), aff'd, 283 N.C. 213, 195 S.E.2d 514 (1973); *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975).

Cited in *Trio Estates, Ltd. v. Dyson*, 10 N.C. App. 375, 178 S.E.2d 778 (1971).

OFFICIAL COMMENT

Prior uniform statutory provision: Section 50, Uniform Sales Act.

Changes: Rewritten.

Purposes of changes: To make it clear that:

1. A tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance. Under subsection (1), therefore, the buyer is given a reasonable time to notify the seller of his rejection, but without such seasonable notification his rejection is ineffective. The sections of this Article dealing with inspection of goods must be read in connection with the buyer's reasonable time for action under this subsection. Contract provisions limiting the time for rejection fall within the rule of the section on "Time" and are effective if the time set gives the buyer a reasonable time for discovery of defects. What constitutes a due "notifying" of rejection by the buyer to the seller is defined in Section 1—201.

2. Subsection (2) lays down the normal duties of the buyer upon rejection, which flow from the relationship of the parties. Beyond his duty to hold the goods with reasonable care for the buyer's disposition, this section continues the policy of prior uniform legislation in generally relieving the buyer from any duties with respect to them, except when the circumstances impose the limited obligation of salvage upon him under the next section.

3. The present section applies only to rightful rejection by the buyer. If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept and his failure to do so constitutes a "wrongful rejection" which gives the seller immediate remedies for breach. Subsection (3) is included here to emphasize the sharp distinction between the rejection of an improper tender and the non-acceptance which is a breach by the buyer.

4. The provisions of this section are to be appropriately limited or modified when a negotiation is in process.

Cross references:

Point 1: Sections 1—201, 1—204(1) and (3), 2—512(2), 2-513(1) and 2—606(1) (b).

Point 2: Section 2—603(1).

Point 3: Section 2—703.

Definitional cross references:

"Buyer". Section 2—103.

"Commercial unit". Section 2—105.

"Goods". Section 2—105.

"Merchant". Section 2—104.

"Notifies". Section 1—201.

"Reasonable time". Section 1—204.

"Remedy". Section 1—201.

"Rights". Section 1—201.

"Seasonably". Section 1—204.

"Security interest". Section 1—201.

"Seller". Section 2—103.

§ 25-2-606. What constitutes acceptance of goods.

What Constitutes Acceptance. — Acceptance is ordinarily signified by language or conduct of the buyer that he will take the goods, but this does not necessarily indicate that the goods conform to the contract. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972);

HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Acceptance may occur by failure of the buyer "to make an effective rejection" after a reasonable opportunity to inspect. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d

161 (1972); *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Acceptance in Code terminology is a term of art which is unrelated to the question of passage of title from seller to buyer and is "only tangentially related to buyer's possession of goods." *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

What Constitutes Rejection. — Effective rejection means (1) rejection within a reasonable time after delivery or tender and (2) seasonable notice to the seller. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Revocation of Acceptance. — Acceptance precludes rejection of the goods accepted and, if made with knowledge of a nonconformity, cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

The buyer may revoke his acceptance if (1) "the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured," and (2) the nonconformity substantially impairs the value of the goods. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Revocation of acceptance must be made within a reasonable time after the buyer discovers, or should have discovered, the ground for it, and it is not effective until the buyer notifies the seller of it. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Acceptance Entitles Seller to Recover Contract Price and Expenses. — An acceptance of the goods entitles the aggrieved seller to recover the contract price of the goods as well as any expenses reasonably incurred as a result of the breach. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

§ 25-2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

Cross Reference. — See note to § 25-2-606.

Acceptance Limits Buyer's Remedy to Damages for Breach. — If buyer accepted a mobile home and did not revoke such acceptance, he was obligated to pay the balance due on the contract price and was limited on his counterclaim to recovery of damages for breach of implied warranty of fitness. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Acceptance of goods by the buyer required that the buyer pay the contract price for the goods accepted, retaining, however, the right to counterclaim for breach of warranty by the seller, and the burden of establishing such

Evidence of Acceptance Sufficient. — Buyer's evidence was sufficient to permit a jury finding that she initially accepted a mobile home on the reasonable assumption that plaintiff would correct the nonconforming defects where it showed that after telling seller when the mobile home was installed that "this is not right and I do not want it," buyer moved into the mobile home and made three monthly payments under the terms of the contract. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Buyer's actions in delivering the checks, signing all the paperwork, and taking delivery of the car were so inconsistent with the seller's ownership as to preclude any other interpretation than that she accepted the car. *American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union*, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Denial of Indebtedness by Defendant Raised Issue of Acceptance. — In an action to recover the balance allegedly due on a contract of sale of a machine wherein the defendant admitted that he purchased and received the machine, that he made no payments under the contract except a down payment, and that plaintiff repossessed the machine, defendant's denial of any indebtedness to the plaintiff raised an issue for the jury as to whether defendant accepted the machine within the meaning of this section; if the jury determines that the defendant accepted the machine, it must then determine what amount, if any, plaintiff is entitled to recover from defendant under the terms of the contract. *Trio Estates, Ltd. v. Dyson*, 10 N.C. App. 375, 178 S.E.2d 778 (1971).

Applied in *Ace Chem. Corp. v. Atomic Paint Co.*, 31 N.C. App. 221, 229 S.E.2d 55 (1976); *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

breach shifted to the buyer. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

But Does Not Bar Action for Breach of Warranty. — While the purchaser of a mobile home was obligated to pay the contract price when she paid the loan on the home and released the lender, thereby accepting the home and barring rejection, she could still maintain an action for breach of warranty. *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 253 S.E.2d 277 (1979).

The burden is upon the buyer to establish a breach by the seller of the warranty of merchantability; that is, to show that the defect

existed at the time of the sale. *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975).

Evidence Sufficient to Make Out Case for Seller. — Seller's proof of the sale and delivery of a car at an agreed price and buyer's admission that she took the car, executed the papers connected with the sale and then refused to pay the purchase price makes out a case entitling seller to recover the amount due on the purchase price, nothing else appearing. *American Imports, Inc. v. G.E. Employees W. Region Fed.*

Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Applied in *Ace Chem. Corp. v. Atomic Paint Co.*, 31 N.C. App. 221, 229 S.E.2d 55 (1976); *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976); *Harrington Mfg. Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282 (1979).

Cited in *Reid v. Eckerd's Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344 (1979).

§ 25-2-608. Revocation of acceptance in whole or in part.

Editor's Note. — For survey of 1972 case law on revocation of acceptance, see 51 N.C.L. Rev. 1170 (1973).

Grounds for Revocation. — The buyer may revoke his acceptance if (1) "the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured," and (2) the nonconformity substantially impairs the value of the goods. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

What Buyer Must Show. — In order for the buyer to show that his revocation was justifiable, the following four elements must be proved: (1) that the goods contained a nonconformity that substantially impaired their value to him; (2) that he either accepted the goods knowing of the nonconformity but reasonably assuming that it would be cured, or that he accepted the goods not knowing of the nonconformity due to the difficulty of discovery or reasonable assurances from the seller that the goods were conforming; (3) that revocation occurred within a reasonable time after he discovered or should have discovered the defect; and (4) that he has notified the seller of his revocation. *Harrington Mfg. Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282 (1979).

What Constitutes Notice to Revoke. — Any conduct clearly manifesting a desire of the buyer to get his money back is a sufficient notice to revoke. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Tender of the goods by the buyer to the seller is not an essential element of a revocation of acceptance. All that is required is a notification of revocation. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Waiver of Right to Rescind. — The purchaser waives his right to rescind if, after discovery of the defect or fraud, he ratifies the sale by continuing to use the chattel for his own purposes. *Cooper v. Mason*, 14 N.C. App. 472, 188 S.E.2d 653 (1972).

Evidence of Revocation Sufficient. — Buyer's evidence was sufficient to permit a jury to find that she revoked her acceptance of a mobile home by reason of seller's failure to

correct nonconforming defects where buyer continually complained to seller of the defects from September to December and thereafter ceased making payments under the contract. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Rescission May Be Treated as Revocation of Acceptance. — Assuming without deciding that rescission remains available to a buyer as a remedy by virtue of § 25-1-103, the Supreme Court gave effect to a buyer's allegation of "rescission" as an allegation of "revocation of acceptance" since that Code concept more nearly reflected the claims asserted by the buyer. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Reasonable Time Is Question for Jury. — What is a reasonable time for a buyer to revoke his acceptance is ordinarily a question of fact for the jury. *Harrington Mfg. Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282 (1979).

The existence of any express or implied warranties would be relevant to show the standard to which the goods were supposed to conform. *Harrington Mfg. Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282 (1979).

All Surrounding Circumstances May Be Considered. — In determining whether revocation was made within a reasonable time after the buyer discovered or should have discovered the nonconformity, it is proper to consider all the surrounding circumstances, including the nature of the defect, the complexity of the goods involved, the sophistication of the buyer, and the difficulty of its discovery. Indeed the reasonable time period may extend in certain cases beyond the time in which notice of the nonconformity has been given, as for example where the parties make attempts at adjustment. *Harrington Mfg. Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282 (1979).

Reasonable Time Exceeded. — Seventeen months and 30,000 miles were held to exceed a reasonable time for revocation of the purchase of an automobile. *Cooper v. Mason*, 14 N.C. App. 472, 188 S.E.2d 653 (1972).

Remaining in Mobile Home after Revocation or Rejection. — The fact that plaintiff stayed in a mobile home unit after allegedly revoking or rejecting the unit does not alone necessarily vitiate any of the buyer's rights. *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Burden Is on Buyer to Show Revocation Justifiable. — When the buyer revokes his acceptance, the burden is on him to show that such revocation was justifiable before he will be allowed to recover. *Harrington Mfg. Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282 (1979).

Facts Insufficient to Justify Revocation. — An automobile buyer had no right under this section to revoke her acceptance of the automobile because (1) the odometer was not working when the car was delivered to her or (2) the fan belt broke two days after the delivery, since there was no evidence that the mileage shown on the odometer was not the actual mileage or that she was prevented from discovery of the actual mileage by the seller's assurances, and since the breaking of the fan belt was insufficient to show such nonconformity as would allow her to revoke her acceptance. *American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union*, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Finding of Revocation or Rejection Warrants Same Relief. — Any error committed

by the district court in finding a rejection instead of a revocation of acceptance must be deemed harmless since evidence warranted a finding of revocation. In either case the plaintiff's relief is the same. *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Buyer Need Not Elect Remedies. — A buyer who revokes his acceptance is not required to elect between revocation of acceptance on the one hand and recovery of damages for breach of implied warranty of fitness on the other; both remedies are then available to him. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Recovery upon Revocation or Rejection. — If the buyer made an effective rejection of a mobile home, or justifiably revoked his acceptance of it, he has a right to recover "so much of the price as had been paid" plus any incidental and consequential damages he is able to prove. *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Applied in *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975); *Ace Chem. Corp. v. Atomic Paint Co.*, 31 N.C. App. 221, 229 S.E.2d 55 (1976); *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Cited in *Wachovia Bank & Trust Co., N.A. v. Smith*, 24 N.C. App. 133, 210 S.E.2d 212 (1974), cert. denied, 286 N.C. 420, 211 S.E.2d 801 (1975).

§ 25-2-610. Anticipatory repudiation.

Editor's Note. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

§ 25-2-615. Excuse by failure of presupposed conditions.

Editor's Note. — For article discussing judicial reallocation of contractual risks under this section, see 54 N.C.L. Rev. 545 (1976).

Applied in *Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975).

PART 7.

REMEDIES.

§ 25-2-702. Seller's remedies on discovery of buyer's insolvency.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this article (§ 25-2-403). Successful reclamation of goods excludes all other remedies with respect to them. (1965, c. 700, s. 1; 1967, c. 562, s. 1.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, deleted "or lien creditor" following "purchaser" in the first sentence of subsection (3). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (3) is set out.

For a discussion of the constructive trust as a remedy for the seller, see 45 N.C.L. Rev. 424 (1967).

For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

The holder of a perfected security interest in after acquired property qualifies as a "good faith purchaser." *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

The holder of a perfected security interest in after acquired property was a "good faith purchaser" whose rights were superior to a seller of the after acquired goods under subsection (2), several commentators have concluded. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1977).

Buyer with Voidable Title Can Transfer Better Title Than He Had. — While the buyer

might have had a voidable title, if he had made fraudulent representations of solvency, one with voidable title can transfer better title than he had. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

Determination of Misrepresentation of Solvency Unnecessary. — A determination of whether written proposals of exchange made by the buyer to the various sellers was a misrepresentation of solvency was not necessary where, even if the conditions to bring sellers within subsection (2) were present, it was clear that the rights of third parties have intervened to cut off their right to reclaim the property. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

Remedy of Reclamation Is Exception To Rule. — Normally, after the seller has delivered the goods to an accepting buyer, the remedy is an action for the price, and it is too late to retrieve the goods. The remedy of reclamation provided by subsection (2) is an exception to this rule. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

§ 25-2-703. Seller's remedies in general.

Cross Reference. — See note to § 25-2-702.

Editor's Note. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

§ 25-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner. (1965, c. 700, s. 1; 1967, c. 24, s. 9.)

Editor's Note.—

The 1967 amendment, originally effective Oct. 1, 1967, inserted the word "scrap" near the end of subsection (2). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

§ 25-2-705. Seller's stoppage of delivery in transit or otherwise.

Editor's Note. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

§ 25-2-706. Seller's resale including contract for resale.

Editor's Note. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

§ 25-2-708. Seller's damages for nonacceptance or repudiation.

Editor's Note. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

Applied in *Industrial Circuits Co. v. Terminal Communications, Inc.*, 26 N.C. App. 536, 216 S.E.2d 919 (1975).

§ 25-2-709. Action for the price.

Editor's Note. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

Seller May Recover Contract Price and Reasonable Expenses. — An acceptance of the goods entitles the aggrieved seller to recover the contract price of the goods as well as any expenses reasonably incurred as a result of the breach. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

What Seller Must Prove. — In an action under subsection (1) of this section for the price of goods sold, the seller must carry the burden of proof as to four elements: (1) acceptance by the buyer of the goods; (2) the price of the goods accepted; (3) the past due date of the price; and (4) the failure of the buyer to pay. *Leviton Mfg.*

Co. v. Butch Mfg. Co., 37 N.C. App. 726, 247 S.E.2d 1, appeal dismissed, 295 N.C. 734, 248 S.E.2d 864 (1978).

Evidence Sufficient to Establish Prima Facie Case. — Where the plaintiff-seller presented competent evidence tending to show delivery at invoice prices, acceptance and use of the goods by defendant-buyer, at invoice prices, demand for payment by plaintiff-seller, acknowledgment of the debt and agreement by defendant to pay, and failure to pay, at the close of the plaintiff's evidence which established a prima facie case, the burden of going forward with the evidence had shifted to defendant. *Leviton Mfg. Co. v. Butch Mfg. Co.*, 37 N.C. App. 726, 247 S.E.2d 1, appeal dismissed, 295 N.C. 734, 248 S.E.2d 864 (1978).

§ 25-2-710. Seller's incidental damages.

Editor's Note. — For a note on the aggrieved seller's remedies and damages under the UCC, see 12 Wake Forest L. Rev. 495 (1976).

Seller May Recover Expenses Reasonably Incurred. — An acceptance of the goods entitles the aggrieved seller to recover the contract price of the goods as well as any expenses reasonably

incurred as a result of the breach. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Applied in *Industrial Circuits Co. v. Terminal Communications, Inc.*, 26 N.C. App. 536, 216 S.E.2d 919 (1975).

§ 25-2-711. Buyer's remedies in general; buyer's security interest in rejected goods.

Recovery of Price Paid and Damages. — If the buyer made an effective rejection of a mobile home, or justifiably revoked his acceptance of it, he has a right to recover "so much of the price as had been paid" plus any incidental and consequential damages he is able to prove. *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

There is no relation between the practice of "hedging" and "cover" under the Uniform

Commercial Code. *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. 1977).

Applied in *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975); *Harrington Mfg. Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282 (1979).

Stated in *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Cited in *Wachovia Bank & Trust Co., N.A. v. Smith*, 24 N.C. App. 133, 210 S.E.2d 212 (1974), cert. denied, 286 N.C. 420, 211 S.E.2d 801 (1975).

§ 25-2-712. "Cover"; buyer's procurement of substitute goods.

Editor's Note. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

Requirements for Remedy of "Cover". — In order to employ the remedy of "cover," the buyer must meet the requirements set out in subsection (1) of this section. First, there must have been a breach of the contract, and the seller must have either repudiated the contract or failed to deliver the goods, or the buyer must have rightfully rejected or justifiably revoked his acceptance of the goods. Second, the buyer

must have acted in good faith and without unreasonable delay in procuring the substitute goods. Finally, the replacement goods must be a reasonable substitute for those the buyer contracted to purchase. *Harrington Mfg. Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282 (1979).

There is no relation between the practice of "hedging" and "cover" under the Uniform Commercial Code. *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. 1977).

§ 25-2-713. Buyer's damages for nondelivery or repudiation.

Editor's Note. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

Cited in *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973); *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. 1977).

§ 25-2-714. Buyer's damages for breach in regard to accepted goods.

Subsection (2) is not the exclusive measure of damages for breach of warranty. *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Special Damages under § 25-2-715 Distinguished. — The distinction between general damages under this section and special damages under § 25-2-715 is principally important with regard to the pleadings and quantum of proof. General damages are the natural and necessary result of the wrong, are implied by law, and may be recovered under a general allegation of damages, whereas special damages, those which do not necessarily result from the wrong, must be pleaded, and the facts giving rise to the special damages must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand. *Rodd v. W.H. King Drug Co.*, 30 N.C. App. 564, 228 S.E.2d 35 (1976).

Amount of Damages Question for Jury. — The determination of the amount of damages recoverable was properly a question for the jury upon consideration of all the evidence presented. *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Burden of Proof of Value. — The burden of proving the (1) value the goods would have had

if they had been as warranted and (2) the value of the goods as accepted, is on the buyer, and this burden of proof as to damages from breach of the sales contract cannot be met by mere conjecture. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Owner Competent to Testify. — Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value even though his knowledge on the subject would not qualify him as a witness were he not the owner. *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 253 S.E.2d 277 (1979).

Contract Price May Serve as Strong Evidence of Value of Goods as Warranted. — See *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974).

Quoted in *Performance Motors, Inc. v. Allen*, 11 N.C. App. 381, 181 S.E.2d 134 (1971); *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Stated in *Ace Chem. Corp. v. Atomic Paint Co.*, 31 N.C. App. 221, 229 S.E.2d 55 (1976).

§ 25-2-715. Buyer's incidental and consequential damages.

Editor's Note. — For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

Purpose of Point 4 of Official Comment to Section. — It was to bring the law into harmony with the market place that the draftsmen of the

Uniform Commercial Code said in Point 4 of the Official Comment to this section: "The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances." *Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 467 F.2d 588 (4th Cir. 1972).

General Damages under § 25-2-714 Distinguished. — The distinction between general damages under § 25-2-714 and special damages under this section is principally important with regard to the pleadings and quantum of proof. General damages are the natural and necessary result of the wrong, are implied by law, and may be recovered under a general allegation of damages. But special damages, those which do not necessarily result from the wrong, must be pleaded, and the facts giving rise to the special damages must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand. *Rodd v. W.H. King Drug Co.*, 30 N.C. App. 564, 228 S.E.2d 35 (1976).

When Prospective Profits from Established Mercantile Business Recoverable. — It may be stated as a general rule that the prospective profits from an established mercantile business, prevented or interrupted by breach of contract, are properly the subject of recovery when it is made to appear (1) that it is reasonably certain that such profits would have been realized except for the breach of the contract, (2) that such profits can be ascertained and measured with reasonable certainty, and (3) that such

profits may be reasonably supposed to have been within the contemplation of the parties, when the contract was made, as the probable result of a breach. *Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 467 F.2d 588 (4th Cir. 1972).

The owner of a knitting mill was not entitled to recover the loss of anticipated profits where the effect on the owner's profits of the contractor's breach of production requirements of a contract to construct a yarn-spinning mill was so remote as to be speculative. *Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 467 F.2d 588 (4th Cir. 1972).

Operating Losses. — Operating losses are special damages which must be alleged under § 1A-1, Rule 9(g) and are consequential damages which are recoverable under subsection (2) of this section if defendant knew or reasonably could have foreseen that the probable result of a malfunctioning product would be such operating losses. *Rodd v. W.H. King Drug Co.*, 30 N.C. App. 564, 228 S.E.2d 35 (1976).

Where the contractor, experienced in the design and construction of spinning mills, knew or reasonably could have foreseen that the probable result of an ill-equipped mill would be a decrease in production, shoddy yarn, and an increase in operating expenses, such operating losses are foreseeable and are recoverable as damages. *Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 467 F.2d 588 (4th Cir. 1972).

Applied in *Harrington Mfg. Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282 (1979).

Cited in *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

§ 25-2-716. Buyer's right to specific performance or replevin. — (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. (1965, c. 700, s. 1; 1967, c. 562, s. 1.)

Cross Reference. — As to action for claim and delivery as substitute for common-law action of replevin, see §§ 1-472 to 1-484 and notes thereto.

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, added "or in other proper circumstances" at the end of

subsection (1). See Editor's note to § 25-1-201.

For note discussing liquidated damages, specific performance and other remedies for breach of cotton sales contracts, see 53 N.C.L. Rev. 579 (1974).

§ 25-2-718. Liquidation or limitation of damages; deposits.

Applied in *Billings v. Joseph Harris Co.*, 290 N.C. 502, 226 S.E.2d 321 (1976).

§ 25-2-719. Contractual modification or limitation of remedy.

Editor's Note. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972). For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973). For note discussing liquidated damages, specific performance and other remedies for breach of cotton sales contracts, see 53 N.C.L. Rev. 579 (1974).

Disclaimer and Substitution of Liabilities under This Section. — A merchant seller may disclaim all liability under § 25-2-316(2) stemming from any breach of warranties of merchantability and fitness under §§ 25-2-314 and 25-2-315, substituting in place thereof the

limitations of subdivision (1)(a) of this section. *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976).

Unconscionability relates to contract terms that are oppressive. It is applicable to one-sided provisions, denying the contracting party any opportunity for meaningful choice. *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976).

Applied in *Billings v. Joseph Harris Co.*, 290 N.C. 502, 226 S.E.2d 321 (1976).

Quoted in *Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 467 F.2d 588 (4th Cir. 1972).

§ 25-2-723. Proof of market price; time and place.

(2) If evidence of a price prevailing at the times or places described in this article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(1967, c. 562, s. 1.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, inserted "in commercial judgment or" near the middle of subsection (2). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

For note discussing the measure of buyer's damages upon anticipatory repudiation, see 56 N.C.L. Rev. 370 (1978).

§ 25-2-725. Statute of limitations in contracts for sale. — (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(1967, c. 562, s. 1.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, added the second sentence of subsection (1). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (1) is set out.

For comment on the liability of the bailor for hire for personal injuries caused by defective goods, see 51 N.C.L. Rev. 786 (1973).

In an action to recover a deficiency remaining after repossession and sale of collateral security, where the defendant had purchased a motor vehicle on credit, executing a purchase money security agreement giving the seller a purchase money security interest in the vehicle and retaining title in the seller or its assignees until the purchase price was fully paid, and where the defendant immediately

defaulted, the 10-year limitation of § 1-47(2) was applicable, rather than the four-year limitation of this section. *North Carolina Nat'l Bank v. Holshouser*, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

The plain language of Article 2 of the North Carolina Uniform Commercial Code and subsequent legislative history indicate that the North Carolina legislature intended Article 9 to govern the security aspects of purchase money security agreements, and that accordingly, the

10-year limitation of § 1-47(2), and not the four-year limitation of this section, is applicable to such agreements executed under seal. *North Carolina Nat'l Bank v. Holshouser*, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

Cited in *Hall v. Gurley Milling Co.*, 347 F. Supp. 13 (E.D.N.C. 1972); *Hager v. Brewer Equip. Co.*, 17 N.C. App. 489, 195 S.E.2d 54 (1973); *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 32 N.C. App. 400, 232 S.E.2d 846 (1977).

ARTICLE 3.

Commercial Paper.

PART 1.

SHORT TITLE, FORM AND INTERPRETATION.

§ 25-3-101. Short title.

Editor's Note. —

For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

§ 25-3-104. Form of negotiable instruments; "draft"; "check"; "certificate of deposit"; "note."

Opinions of Attorney General. — Mr. Fred P. Parker, Jr., Wayne County Attorney, 40 N.C.A.G. 817 (1969).

The full tests for determining whether a particular instrument is a negotiable instrument under this Article can be determined only by reading §§ 25-3-104 through 25-3-112 as a unit. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

As Does Condition. —

Under the law of this State prior to the adoption of the Uniform Commercial Code, it was clearly established that a conditional promise or contingent condition contained in the instrument itself had the effect of defeating the negotiability of the instrument. This prior law is carried forward in subsection (1)(b). *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Note Not Payable to Order or Bearer, etc. —

A draft is not a negotiable instrument when it is payable to two named payees without the addition of the words "or order," or any similar

words of negotiability. *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972).

Under old law of commercial paper and now incorporated into the Uniform Commercial Code, a note payable neither to order nor to bearer is not negotiable. *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

Specificity on the face of the negotiable instrument is required whether payment be to order or to bearer. *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

A traveler's check is a negotiable instrument within the purview of this article. *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

Applied in *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E.2d 46 (1977); *Liles v. Myers*, 38 N.C. App. 525, 248 S.E.2d 385 (1978).

Cited in *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

§ 25-3-105. When promise or order unconditional.

Reference to Separate Agreement. — Under subsections (1)(b) and (c), it is clear that mere

reference in a note to the separate agreement or document out of which the note arises does not

affect the negotiability of the note. But to go beyond a reference to the separate agreement, by incorporating the terms of that agreement into the note, makes the note "subject to or governed by" that agreement, and thus, under subsection (2)(a), renders the promise conditional and the note nonnegotiable. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

§ 25-3-108. Payable on demand.

A note stating that it was due at request with 30 days' notice was a demand note. *Shields v.*

When the instrument itself makes express reference to an outside agreement, transaction or document, the effect on the negotiability of the instrument will depend on the nature of the reference. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Prendergast, 36 N.C. App. 633, 244 S.E.2d 475 (1978).

§ 25-3-110. Payable to order.

Draft Payable to Payees without Addition of Word "or Order," etc. — A draft is not a negotiable instrument when it is payable to two named payees without the addition of the words

"or order," or any similar words of negotiability. *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972).

§ 25-3-111. Payable to bearer.

Specificity on the face of the negotiable instrument is required whether payment be to

order or to bearer. *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

§ 25-3-112. Terms and omissions not affecting negotiability.

The full tests for determining whether a particular instrument is a negotiable instrument under this article can be determined only by reading §§ 25-3-104 through 25-3-112 as a unit. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

The payee's name is not one of the terms and omissions not affecting negotiability under this section. *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

§ 25-3-113. Seal.

Cited in *Bank of N.C. v. Cranfill*, 37 N.C. App. 182, 245 S.E.2d 538 (1978).

§ 25-3-114. Date, antedating, postdating.

Stated in *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

§ 25-3-115. Incomplete instruments.

The name of the payee is an essential element. *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

Dating is not a necessary element, the absence of which makes the instrument

incomplete and unenforceable under this section. *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

Travelers checks which were not dated and did not bear the name of the payee remained

incomplete and unenforceable as a matter of law, where plaintiff had the authority to complete the instruments, had nine years to do so, and did not. *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

Scope of Presumptive Authority to Fill Blanks. — The presumptive authority to fill blanks extends to every incomplete feature of the instrument. The authority is to fill all blanks in general conformity to the character of the paper or as the person in possession thinks proper. *Jones v. Jones*, 268 N.C. 701, 151 S.E.2d 587 (1966), construing former § 25-20 (Section 14, Uniform Negotiable Instruments Law).

Any and all blanks may be filled in which are necessary and proper to make the instrument a perfect and complete bill of exchange or promissory note, as the case may be. *Jones v.*

Jones, 268 N.C. 701, 151 S.E.2d 587 (1966), construing former § 25-20 (Section 14, Uniform Negotiable Instruments Law).

The pronoun "I" or "We" may be inserted under the implied power to fill blanks. *Jones v. Jones*, 268 N.C. 701, 151 S.E.2d 587 (1966), construing former § 25-20 (Section 14, Uniform Negotiable Instruments Law).

As May Name of Payee. — Parties signing a note with others as makers, the note being complete except for the insertion of the name of the payee or payees, clothe the primary makers with authority to complete the instrument by inserting the name of the payees. *Jones v. Jones*, 268 N.C. 701, 151 S.E.2d 587 (1966), construing former § 25-20 (Section 14, Uniform Negotiable Instruments Law).

§ 25-3-118. Ambiguous terms and rules of construction.

Subsection (e) of this section does not change the rule in this State that a prior endorser is not entitled to recover from a subsequent endorser in the absence of an agreement otherwise establishing liability. *Wilson v. Turner*, 29 N.C. App. 101, 223 S.E.2d 539, cert. denied, 290 N.C. 311, 225 S.E.2d 832 (1976).

Name Signed at Place Regularly Provided for Makers. — Where the wife of one of the makers of a note affixed her signature and seal to the bottom right-hand corner of the instrument, among the signatures of the makers

of the note, although her name was not typed in at the top as a "borrower-debtor," by signing the note at a place regularly provided for makers of a note, she thereby became a maker of the note rather than an endorser. Her signature at this place, plus the fact that the terms of the note itself refer to the "undersigned" as "debtor," dispelled any ambiguity which might have rendered her an endorser under § 25-3-402. *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978).

Quoted in *Branch Banking & Trust Co. v. Gill*, 286 N.C. 342, 211 S.E.2d 327 (1975).

§ 25-3-120. Instruments "payable through" bank.

Applied in *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972).

Stated in *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

§ 25-3-122. Accrual of cause of action; interest.

A note stating that it was due at request with 30 days' notice was a demand note. *Shields v.*

Prendergast, 36 N.C. App. 633, 244 S.E.2d 475 (1978).

PART 2.

TRANSFER AND NEGOTIATION.

§ 25-3-201. Transfer; right to indorsement.

Purpose of Subsection (1). — The shelter principle of subsection (1) of this section seeks to ensure that a holder in due course always enjoys a ready market for the paper he owns. *Rozen v. North Carolina Nat'l Bank*, 588 F.2d 82 (4th Cir.

1978).

The shelter principle of subsection (1) applies with greatest vigor to holders of time instruments yet to come due for in such cases the holder cannot collect from the maker. If the

holder needs immediate funds, he must turn to the market. If, however, notice of claims and defenses is widespread, free transfer will be inhibited. Thus, this section protects the transferee so as to create a market for the transferor. *Rozen v. North Carolina Nat'l Bank*, 588 F.2d 83 (4th Cir. 1978).

Exclusion from Shelter Principle of Persons Having Notice of Prior Claims. — The exclusion from the shelter principle of one who, having had notice of prior claims, takes back an instrument from a holder in due course rests upon sound principle and simple logic. Operation of the shelter principle in favor of such a person would defeat the purpose of subjecting him to defenses of the maker. Without the exception to the shelter principle, one not a holder in due course, by a transfer and an agreement to repurchase, could readily avoid the limitations under which he held the instrument in the first place. *Rozen v. North Carolina Nat'l Bank*, 588 F.2d 83 (4th Cir. 1978).

§ 25-3-202. Negotiation.

Right of Payee to Assume that Check Requires His Endorsement. — The payee of a check, as well as the drawer, has a right to expect the drawee bank to pay it in accordance with its terms. Therefore, when the drawer issues a check to the order of a named payee, the payee — absent his agreement to the contrary, or any conduct on his part creating an estoppel — can assume that he has valuable paper of a particular commercial character, i.e., one which will require his endorsement for title to pass to

The pledgee of a negotiable instrument may qualify as a holder in due course, but the pledgee's rights are limited by his secured creditor's status. *Rozen v. North Carolina Nat'l Bank*, 588 F.2d 83 (4th Cir. 1978).

Claim Falling Outside Protection of Shelter Principle. — Assignee's claim seeking the face value of a certificate of deposit fell outside the protective sweep of the shelter principle in subsection (1) of this section, where the actual assignor of the instrument, having had notice of prior claims, first assigned the certificate to a third party as security for a loan, then in fact took back the instrument before it was assigned to the assignee, despite efforts to avoid the appearance of reacquisition. Since the actual assignor was not a holder in due course, the assignee could not have become a holder in due course derivatively. *Rozen v. North Carolina Nat'l Bank*, 588 F.2d 83 (4th Cir. 1978).

Applied in *Smathers v. Smathers*, 34 N.C. App. 724, 239 S.E.2d 637 (1977).

a taker, or for discharge to be effected by the action of the drawee in marking the check "paid" and charging it against the account of the drawer. *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*, 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under NIL).

Applied in *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972); *Liles v. Myers*, 38 N.C. App. 525, 248 S.E.2d 385 (1978).

§ 25-3-203. Wrong or misspelled name.

Applied in *Agaliotis v. Agaliotis*, 38 N.C. App. 42, 247 S.E.2d 28 (1978).

§ 25-3-205. Restrictive indorsements.

Applied in *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E.2d 46 (1977).

Cited in *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

§ 25-3-206. Effect of restrictive indorsement.

Cited in *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

§ 25-3-207. Negotiation effective although it may be rescinded.

Editor's Note. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

PART 3.

RIGHTS OF A HOLDER.

§ 25-3-301. Rights of a holder.

Applied in *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E.2d 46 (1977).

Cited in *Smathers v. Smathers*, 34 N.C. App. 724, 239 S.E.2d 637 (1977); *Booker v. Everhart*,

294 N.C. 146, 240 S.E.2d 360 (1978); *In re Cooke*, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

§ 25-3-302. Holder in due course.

The pledgee of a negotiable instrument may qualify as a holder in due course, but the pledgee's rights are limited by his secured

creditor's status. *Rozen v. North Carolina Nat'l Bank*, 588 F.2d 83 (4th Cir. 1978).

§ 25-3-303. Taking for value.

The wording of this section contemplates a simultaneous transaction — a commitment to a third person made when the holder takes the instrument, not a commitment made subsequent to the taking of the instrument. Therefore, plaintiff's subsequent reliance on payment of

draft did not constitute a taking for value necessary to put plaintiff in the position of holder in due course. *Bennett v. United States Fid. & Guar. Co.*, 19 N.C. App. 66, 198 S.E.2d 33, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

§ 25-3-305. Rights of a holder in due course. — To the extent that a holder is a holder in due course he takes the instrument free from

(1) all claims to it on the part of any person; and
(2) all defenses of any party to the instrument with whom the holder has not dealt except

(a) infancy, to the extent that it is a defense to a simple contract; and
(b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and

(c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and

(d) discharge in insolvency proceedings; and
any other discharge of which the holder has notice when he takes the instrument. (1899, c. 733, ss. 15, 16, 57; Rev., ss. 2165, 2166, 2206; C. S., ss. 2996, 2997, 3038; 1965, c. 700, s. 1.)

Editor's Note. — This section is set out in the Supplement to correct an error occurring in the replacement volume.

For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

Applied in *Mozingo v. North Carolina Nat'l Bank*, 31 N.C. App. 157, 229 S.E.2d 57 (1976); *Ralph Stachon & Assocs. v. Greenville Broadcasting Co.*, 35 N.C. App. 540, 241 S.E.2d 884 (1978); *Rozen v. North Carolina Nat'l Bank*, 588 F.2d 83 (4th Cir. 1978).

§ 25-3-306. Rights of one not holder in due course.

Editor's Note. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

One who acquires a note as a mere assignee, without the paying of consideration therefor, is

not a holder in due course. *Ridley v. Jim Walter Corp.*, 272 N.C. 673, 158 S.E.2d 869 (1968).

Applied in *Mozingo v. North Carolina Nat'l Bank*, 31 N.C. App. 157, 229 S.E.2d 57 (1976); *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E.2d 46 (1977); *Ralph Stachon & Assocs. v. Greenville*

Broadcasting Co., 35 N.C. App. 540, 241 S.E.2d 884 (1978).

Cited in *Tifco, Inc. v. Insurance Designers Underwriters Group, Inc.*, 30 N.C. App. 641, 228 S.E.2d 60 (1976).

§ 25-3-307. Burden of establishing signatures, defenses and due course.

Editor's Note. — For article on waiver of defense clauses in consumer contracts, see 48 N.C.L. Rev. 545 (1970).

Words Purporting to Be Indorsement Do Not Prove Themselves. — Words, written on the back of a negotiable instrument, purporting to be an indorsement by which the instrument was negotiated, do not prove themselves. *Bank of Statesville v. Blackwelder Furniture Co.*, 11 N.C. App. 530, 181 S.E.2d 785, cert. denied, 279 N.C. 393, 183 S.E.2d 241 (1971).

The mere introduction of a note, payable to order, with words written on the back thereof, purporting to be an indorsement by the payee, does not prove or tend to prove their genuineness. *Bank of Statesville v. Blackwelder Furniture Co.*, 11 N.C. App. 530, 181 S.E.2d 785, cert. denied, 279 N.C. 393, 183 S.E.2d 241 (1971).

Thus, Burden Shifted, etc. —

Where an infirmity in the note has been established so as to create a valid defense by the maker and this defense is sought to be avoided by the establishment of a holder in due course, then the person claiming to be the holder in due course has the burden of proving it. *Bank of Statesville v. Blackwelder Furniture Co.*, 11 N.C. App. 530, 181 S.E.2d 785, cert. denied, 279 N.C. 393, 183 S.E.2d 241 (1971).

Burden of Establishing That One Is Holder in Due Course. — For a person to acquire the

position of a holder in due course of a negotiable instrument so as to effectually cut off any defenses which the maker might have, he has the burden of establishing that he is, in all respects, a holder in due course. This includes establishing the authority of a purported endorser to execute such indorsement. *Bank of Statesville v. Blackwelder Furniture Co.*, 11 N.C. App. 530, 181 S.E.2d 785, cert. denied, 279 N.C. 393, 183 S.E.2d 241 (1971).

Not Carried by Presenting Only Note to Prove Authority of Endorser. — Where defendant had established, by admissions and affidavits, that it had a defense of failure of consideration insofar as the payee was concerned, and the plaintiff sought to cut off this defense by being a holder in due course, the burden thereupon fell to the plaintiff to show that it was "in all respects a holder in due course." By presenting nothing more than the note itself to prove the authority of the endorser to indorse for the payee, plaintiff failed to carry his burden. *Bank of Statesville v. Blackwelder Furniture Co.*, 11 N.C. App. 530, 181 S.E.2d 785, cert. denied, 279 N.C. 393, 183 S.E.2d 241 (1971).

Applied in *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E.2d 46 (1977); *Old S. Life Ins. Co. v. Bank of N.C.*, 36 N.C. App. 18, 244 S.E.2d 264 (1978).

PART 4.

LIABILITY OF PARTIES.

§ 25-3-401. Signature.

This section does not affect the liability of a nonsigner in connection with an original obligation for which the instrument was later given on other circumstances relating to the same transactions. *North Carolina Nat'l Bank v.*

Wallens, 31 N.C. App. 721, 230 S.E.2d 690 (1976).

Cited in *Bank of N.C. v. Cranfill*, 37 N.C. App. 182, 245 S.E.2d 538 (1978).

§ 25-3-402. Signature in ambiguous capacity.

Signature Held Not Ambiguous. — Where the wife of one of the makers of a note affixed

her signature and seal to the bottom right-hand corner of the instrument, among the signatures

of the makers of the note, although her name was not typed in at the top as a "borrower-debtor," by signing the note at a place regularly provided for makers of a note, she thereby became a maker of the note rather than an endorser. Her signature at this place,

plus the fact that the terms of the note itself refer to the "undersigned" as "debtor," dispelled any ambiguity which might have rendered her an endorser under this section. *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-3-403. Signature by authorized representative.

Cross Reference. — See note to § 25-3-307.

Editor's Note. — For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

Burden on Signing Party to Avoid Personal Obligation. — The clear intent of the statute is that the signing party has the burden to otherwise establish, else he incurs the personal obligation which the statute imposes. *Southern Nat'l Bank v. Pocock*, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

Undisclosed Intention Not To Be Personally Obligated Irrelevant by Itself. — It takes more than an intention of one party undisclosed to the other to establish the requisite understanding between the parties necessary to invoke the exception to personal liability under subdivision (2)(b) of this section. *Southern Nat'l Bank v. Pocock*, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

Subdivision (2)(b) allows introduction of parol evidence to establish requisite agency status to avoid personal liability. *North Carolina Equip. Co. v. DeBruhl*, 28 N.C. App. 330, 220 S.E.2d 867, cert. denied, 289 N.C. 451, 223 S.E.2d 160 (1976).

Alter Ego Doctrine Inapplicable. — Evidence establishing that defendant's den was the corporate office, that defendant had not read the corporate bylaws and that he was not familiar with the corporation's tax matters was not sufficient evidence to show that the corporation was "ignored as a separate entity," and was insufficient to apply the alter ego doctrine and hold defendant personally liable. *North Carolina Equip. Co. v. DeBruhl*, 28 N.C. App. 330, 220 S.E.2d 867, cert. denied, 289 N.C. 451, 223 S.E.2d 160 (1976).

§ 25-3-404. Unauthorized signatures.

Retention of Benefits as Ratification. — A retention of benefits, with knowledge of his unauthorized signature, by one whose name was

signed without authorization may be found to be a ratification. *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-3-405. Impostors; signature in name of payee.

Where Drawer Intends Imposter to Take Possession as Payee. — Where the drawer, mistaken as to the identity of the person to whom he delivers a check, nevertheless intends that the procurer himself shall take title and possession as payee, the endorsement of the

imposter will be regarded as genuine as to subsequent persons dealing in good faith with the instrument, and the bank is protected. *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*, 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under NIL).

§ 25-3-406. Negligence contributing to alteration or unauthorized signature.

Editor's Note. — For note on estoppel and forged indorsements under the Uniform

Commercial Code, see 47 N.C.L. Rev. 256 (1968).

§ 25-3-407. Alteration.

Applied in *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972); *Mitchell v. Republic Bank &*

Trust Co., 35 N.C. App. 101, 239 S.E.2d 867 (1978).

§ 25-3-408. Consideration.

Applied in *Ralph Stachon & Assocs. v. Greenville Broadcasting Co.*, 35 N.C. App. 540, 241 S.E.2d 884 (1978).

§ 25-3-409. Draft not an assignment.

Payee Has No Right of Action, etc. —

The acceptance of a check is the promise of the drawee to pay it, and, until that promise is made, no contractual relation exists between the

drawee and the payee. *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*, 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under the NIL).

§ 25-3-410. Definition and operation of acceptance.

Acceptance and Payment Are Different. — Payment is the performance of the drawee's promise — the expected and intended end of the check. Acceptance prolongs the life of the check; payment ends it. Thus, the two are fundamentally different. *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*, 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under the NIL).

The acceptance of a check is the promise of the drawee to pay it, and, until that promise is made, no contractual relation exists between the drawee and the payee. *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*, 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under the NIL).

Marking Check "Paid" Did Not Constitute "Constructive Acceptance". — The act of a bank in marking a check "paid" and charging it against a depositor's account did not constitute

a "constructive acceptance" under former § 25-144. That section provided that "where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery . . . to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same." It contemplated a case where the bill or check was delivered to the drawee for the purpose of procuring an acceptance or certification; it was never intended to apply to an erroneous payment. *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*, 266 N.C. 648, 147 S.E.2d 37, 386 (1966).

Applied in *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972).

§ 25-3-414. Contract of indorser; order of liability.

Editor's Note. — For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

Presumption as to Order of Liability Unchanged. — The Uniform Commercial Code did not change the North Carolina rule that

endorsers are presumed to be liable in the order in which their signatures appear on the instrument. *Wilson v. Turner*, 29 N.C. App. 101, 223 S.E.2d 539, cert. denied, 290 N.C. 311, 225 S.E.2d 832 (1976).

§ 25-3-415. Contract of accommodation party.

An accommodation party is always a surety. *First Citizens Bank & Trust Co. v. Larson*, 22

N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

§ 25-3-417. Warranties on presentment and transfer.

When Warranty of Good Title Broken. — A warranty to a person who pays an instrument in good faith that the person who obtains payment has a good title to the instrument or is authorized to obtain payment on behalf of one who has a good title to it is broken if such person

claims through the forged instrument of a joint payee having any interest in the proceeds of the paper. *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972).

§ 25-3-419. Conversion of instrument; innocent representative.

Editor's Note. — For case note on recovery by payee against drawee bank on checks paid over forged endorsement, see 44 N.C.L. Rev. 1073 (1966).

Payment of Check on Forged or Unauthorized Endorsement. — The majority of jurisdictions, both before and after the adoption of the NIL, allowed the holder to recover on the theory of a conversion of the check when the drawee paid a check upon a forged or unauthorized endorsement. *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*, 266 N.C. 648, 147 S.E.2d 37, 386 (1966).

In paying a check to an agent, a bank assumes the risk that he is without authority to endorse it. *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*, 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under the NIL).

The payee of a check as well as the drawer, has the right to expect the bank to pay the check in accordance with its tenor, and when the bank pays the check to an agent of the payee it is necessary to the bank's protection that it ascertain that the agent is authorized to receive

payment for the payee, and the drawer has no right, as against the payee, to direct its payment to anyone else. *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*, 266 N.C. 648, 147 S.E.2d 37, 386 (1966).

Payment to Unauthorized Person without Payee's Endorsement. — When the drawee bank takes a check without the payee's endorsement, delivers cash in the amount of the check to one unauthorized to receive its payment, and ultimately returns the check to the maker, the bank has assumed complete control over the check, dealt with it as its own, and withheld it from its rightful owner. Such dealings constitute a tortious conversion of the check, and the payee is entitled to recover its value. *Prima facie*, this is the face value of the paper converted. *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*, 266 N.C. 648, 147 S.E.2d 37, 386 (1966) (decided under the NIL).

Quoted in North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977).

PART 5.

PRESENTMENT, NOTICE OF DISHONOR AND PROTEST.

§ 25-3-501. When presentment, notice of dishonor, and protest necessary or permissible.

(3) Unless excused (§ 25-3-511) protest of any dishonor is necessary to charge the drawer and indorsers of any draft which on its face appears to be drawn or payable outside of the states, territories, dependencies and possessions of the United States, the District of Columbia and the Commonwealth of Puerto Rico. The holder may at his option make protest of any dishonor of any other instrument and in the case of a foreign draft may on insolvency of the acceptor before maturity make protest for better security.

(1967, c. 562, s. 1.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, substituted "territories, dependencies and possessions of the United States, the District of Columbia and the Commonwealth of Puerto Rico" for "and

territories of the United States and the District of Columbia" at the end of the first sentence of subsection (3). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (3) is set out.

§ 25-3-505. Rights of party to whom presentment is made.

Cited in *Tifco, Inc. v. Insurance Designers Underwriters Group, Inc.*, 30 N.C. App. 641, 228 S.E.2d 60 (1976).

§ 25-3-507. Dishonor; holder's right of recourse; term allowing re-presentment.

Cited in *Tifco, Inc. v. Insurance Designers Underwriters Group, Inc.*, 30 N.C. App. 641, 228 S.E.2d 60 (1976).

PART 6.

DISCHARGE.

§ 25-3-602. Effect of discharge against holder in due course.

Cited in *Liles v. Myers*, 38 N.C. App. 525, 248 S.E.2d 385 (1978).

§ 25-3-603. Payment or satisfaction.

Cited in *Tifco, Inc. v. Insurance Designers Underwriters Group, Inc.*, 30 N.C. App. 641, 228 S.E.2d 60 (1976).

§ 25-3-606. Impairment of recourse or of collateral.

Suretyship Defenses Are Available to Accommodation Maker or Acceptor. — Suretyship defenses are not limited to parties who are "secondarily liable," but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so. *First Citizens Bank & Trust Co. v. Larson*, 22 N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

Holder Not Required to File Security Agreement. — There is nothing in the Code nor any case law requiring the holder to file a security agreement. *First Citizens Bank & Trust Co. v. Larson*, 22 N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

A trust company holding a note executed by a bankrupt corporation had no duty to the endorers to file the security agreement later executed in proper form for recordation in order to protect the collateral for the endorers. *First Citizens Bank & Trust Co. v. Larson*, 22 N.C.

App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

And Mere Failure to File May Not Constitute Unjustified Impairment of Collateral. — Since there is no absolute duty to file a security agreement, whether the mere failure to file would constitute an unjustifiable impairment of collateral must depend upon the facts of the particular case. *First Citizens Bank & Trust Co. v. Larson*, 22 N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

Which Is Required by U.C.C. — Even though impairment of collateral by the holder would generally discharge the surety under the N.I.L. and even though the U.C.C. may have made that defense available to an accommodation endorser, nevertheless, the Code has added a requirement. The holder must have unjustifiably impaired the collateral. *First Citizens Bank & Trust Co. v. Larson*, 22 N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

PART 8.

MISCELLANEOUS.

§ 25-3-802. Effect of instrument on obligation for which it is given. — (1) Unless otherwise agreed where an instrument is taken for an underlying obligation

(a) the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and

(b) in any other case the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is

dishonored, action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation to the extent of his discharge on the instrument.

(2) The taking in good faith of a check which is not postdated does not of itself so extend the time on the original obligation as to discharge a surety. (1965, c. 700, s. 1; 1967, c. 562, s. 1.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, added at the end of the second sentence of paragraph (b) of

subsection (1) "to the extent of his discharge on the instrument." See Editor's note to § 25-1-201.

§ 25-3-805. Instruments not payable to order or to bearer.

Article 3 of the Uniform Commercial Code applies to a nonnegotiable draft, payable to two named payees without the addition of the words "or order," or any similar words of negotiability, except that no holder of it can be a holder in due

course. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

Cited in Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978).

ARTICLE 4.

Bank Deposits and Collections.

PART 1.

GENERAL PROVISIONS AND DEFINITIONS.

§ 25-4-101. Short title.

Editor's Note. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

Applied in First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

§ 25-4-102. Applicability.

Editor's Note. — For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

§ 25-4-103. Variation by agreement; measure of damages; certain action constituting ordinary care.

Cited in Fidelity & Deposit Co. v. Bank of Bladenboro, 596 F.2d 632 (4th Cir. 1979).

§ 25-4-104. Definitions and index of definitions.

Applied in North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720 (1978).

§ 25-4-105. “Depository bank”; “intermediary bank”; “collecting bank”; “payor bank”; “presenting bank”; “remitting bank.”

Applied in *North Carolina Nat'l Bank v. Harwell*, 38 N.C. App. 190, 247 S.E.2d 720 (1978).

§ 25-4-106. Separate office of a bank. — A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders shall be given under this article and under article 3. (1965, c. 700, s. 1; 1967, c. 562, s. 1.)

Editor's Note. —

The 1967 amendment, effective at midnight June 30, 1967, deleted “maintaining its own deposit ledgers” following the word “bank” where it first appears in this section. See Editor's note to § 25-1-201.

Intent of 1967 Amendment. — The legislature, in deleting in 1967 the provisions of this section requiring the maintenance of separate deposit ledgers, intended to lessen the requirements for a branch to attain separate bank status. This amendment is consistent with the legislature's encouragement of statewide branch banking to serve the “needs and convenience” of the public. *North Carolina Nat'l Bank v. Harwell*, 38 N.C. App. 190, 247 S.E.2d 720 (1978), cert. denied, 296 N.C. 410, S.E.2d (1979).

The application of this section is not mandatory. *North Carolina Nat'l Bank v.*

Harwell, 38 N.C. App. 190, 247 S.E.2d 720 (1978), cert. denied, 296 N.C. 410, S.E.2d (1979).

A branch or separate office may be treated as a separate bank for certain purposes while maintaining the single legal entity for other reasons. *North Carolina Nat'l Bank v. Harwell*, 38 N.C. App. 190, 247 S.E.2d 720 (1978), cert. denied, 296 N.C. 410, S.E.2d (1979).

Branch Banks Entitled to Separate Status. — Branch banks, each operating through a different operations center which maintained the accounts of customers in its district separately, were entitled to separate bank status under this section in considering the issue before the court of whether the plaintiff preserved its right of charge-back against the defendant's account. *North Carolina Nat'l Bank v. Harwell*, 38 N.C. App. 190, 247 S.E.2d 720 (1978), cert. denied, 296 N.C. 410, S.E.2d (1979).

PART 2.

COLLECTION OF ITEMS: DEPOSITORY AND COLLECTING BANKS.

§ 25-4-204. Methods of sending and presenting; sending direct to payor.

Editor's Note. — Session Laws 1967, c. 562, s. 1, amended the catchline of this section to read as set out above.

As the text of the section was not changed, only the catchline is set out.

§ 25-4-207. Warranties of customer and collecting bank on transfer or presentment of items; time for claims.

Forged Endorsement as Breach of Warranty. — A collecting bank breached its warranty of “good title” to its transferee, where the payee's endorsement on a check was forged. *North Carolina Nat'l Bank v. Hammond*, 40 N.C. App. 34, 252 S.E.2d 104 (1979).

Applied in *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972).

§ 25-4-208. Security interest of collecting bank in items, accompanying documents and proceeds.

Editor's Note. — For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

Bank May Pay against Uncollected Item. — North Carolina law appears to contemplate that, in the exercise of ordinary care, a bank may

conclude to pay against an uncollected item, because it gives a bank a security interest in an item against which it has made an advance. *Fidelity & Deposit Co. v. Bank of Bladenboro*, 596 F.2d 632 (4th Cir. 1979).

Cited in *Southern Nat'l Bank v. Universal Acc. Corp.*, 2 N.C. App. 319, 163 S.E.2d 10 (1968).

§ 25-4-209. When bank gives value for purposes of holder in due course.

Cited in *Southern Nat'l Bank v. Universal Acc. Corp.*, 2 N.C. App. 319, 163 S.E.2d 10 (1968).

§ 25-4-211. Media of remittance; provisional and final settlement in remittance cases.

(3) A settlement for an item by means of a remittance instrument or authorization to charge is or becomes a final settlement as to both the person making and the person receiving the settlement.

(a) if the remittance instrument or authorization to charge is of a kind approved by subsection (1) or has not been authorized by the person receiving the settlement and in either case the person receiving the settlement acts seasonably before its midnight deadline in presenting, forwarding for collection or paying the instrument or authorization, — at the time the remittance instrument or authorization is finally paid by the payor by which it is payable;

(b) if the person receiving the settlement has authorized remittance by a nonbank check or obligation or by a cashier's check or similar primary obligation of or a check upon the payor or other remitting bank which is not of a kind approved by subsection (1)(b), — at the time of the receipt of such remittance check or obligation; or

(c) if in a case not covered by subparagraphs (a) or (b) the person receiving the settlement fails to seasonably present, forward for collection, pay or return a remittance instrument or authorization to it to charge before its midnight deadline, — at such midnight deadline. (1965, c. 700, s. 1.)

Editor's Note. — Subsection (3) is set out to correct a typographical error in the replacement volume.

§ 25-4-212. Right of charge-back or refund.

Applied in *North Carolina Nat'l Bank v. Harwell*, 38 N.C. App. 190, 247 S.E.2d 720 (1978).

§ 25-4-213. Final payment of item by payor bank; when provisional debits and credits become final; when certain credits become available for withdrawal.

Applied in *North Carolina Nat'l Bank v. Harwell*, 38 N.C. App. 190, 247 S.E.2d 720 (1978).

PART 3.

COLLECTION OF ITEMS: PAYOR BANKS.

§ 25-4-301. Deferred posting; recovery of payment by return of items; time of dishonor.

Applied in *North Carolina Nat'l Bank v. Harwell*, 38 N.C. App. 190, 247 S.E.2d 720 (1978).

PART 4.

RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER.

§ 25-4-401. When bank may charge customer's account.

Payment of any overdraft by a bank amounts to a loan to the depositor, and the amount may be recovered from the depositor. The action to recover the amount of the overdraft is based upon the implied promise

which arises from the drawing of the check and the honoring of it by the bank. *First-Citizens Bank & Trust Co. v. Perry*, 40 N.C. App. 272, 252 S.E.2d 288 (1979).

§ 25-4-403. Customer's right to stop payment; burden of proof of loss.

Drawer's Liability to Holder Not Discharged by Stop Order. — By acting in apt time, the drawer of a check may stop its payment, but his revocation of the bank's authority to pay the check does not discharge his liability to the payee or holder. *Reeves v. Journey*, 29 N.C. App. 739, 225 S.E.2d 615, cert. denied, 290 N.C. 663, 228 S.E.2d 454 (1976).

Amount of Loss Must Be More than Mere Debiting of Bank Account. — Where the bank pleads nonloss by the bank customer, a bank customer, in order to recover for damages caused by the bank's payment of a check contrary to a valid stop payment order, must show some loss other than the mere debiting of

his bank account in the amount of the check. *Mitchell v. Republic Bank & Trust Co.*, 35 N.C. App. 101, 239 S.E.2d 867 (1978).

Burden of Proof. — A prima facie case of loss is established by the customer when he shows that the bank paid a check contrary to a valid stop payment order. Then the bank, exercising its subrogation rights created by § 25-4-407, has the burden of coming forward and presenting evidence of an absence of actual loss sustained by the customer. When the bank meets the burden of coming forward, the customer must sustain the ultimate burden of proving loss. *Mitchell v. Republic Bank & Trust Co.*, 35 N.C. App. 101, 239 S.E.2d 867 (1978).

§ 25-4-405. Death or incompetence of customer. — (1) A payor or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(2) Even with knowledge a bank may for ten days after the date of death pay or certify checks drawn on or prior to that date unless ordered to stop payment by a person claiming an interest in the account.

(3) A transaction, although subject to this article, is also subject to § 105-24, and § 41-2.1, and in case of conflict between the provisions of this section and either of those sections, the provisions of those sections control. (1965, c. 700, s. 1; 1967, c. 24, s. 10; c. 562, s. 1.)

Editor's Note. —

Session Laws 1967, c. 24, originally effective Oct. 1, 1967, corrected an error by substituting "of" for "or" in the first sentence of subsection (1). Session Laws 1967, c. 1078, amends c. 24 so

as to make it effective July 1, 1967. Session Laws 1967, c. 562, effective at midnight June 30, 1967, made the same correction in subsection (1) and added subsection (3). See Editor's note to § 25-1-201.

§ 25-4-406. Customer's duty to discover and report unauthorized signature or alteration.

Applied in First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

ARTICLE 5.

Letters of Credit.

§ 25-5-101. Short title.

Editor's Note. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

§ 25-5-102. Definitions and index of definitions.

The letter of credit is a contract. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

Applied in O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-5-103. Definitions.

Nature of Letter of Credit. — Since the letter of credit is essentially a contract between the issuer and the beneficiary, it is recognized by this Article as being independent of the

underlying contract between the customer and the beneficiary. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-5-104. Formal requirements; signing.

Applied in O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-5-105. Consideration.

Applied in O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-5-109. Issuer's obligation to its customer.

Drawee bank is involved only with documents, not with merchandise. Its involvement is altogether separate and apart from the transaction between the buyer and seller; its duties and liability are governed

exclusively by the terms of the letter, not the terms of the parties' contract with each other. Courtaulds N. America, Inc. v. North Carolina Nat'l Bank, 528 F.2d 802 (4th Cir. 1975).

Drawee bank is not to be embroiled in

disputes between buyer and seller, the beneficiary of the credit. *Courtaulds N. America, Inc. v. North Carolina Nat'l Bank*, 528 F.2d 802 (4th Cir. 1975).

The legal standard which the issuer is required to meet in order to avoid liability is one requiring a careful examination of the documents to determine if they are regular on their face. *Courtaulds N. America, Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

When an issuer discovers a possible discrepancy, it is incumbent upon it to disclose that fact to the beneficiary as soon as reasonably possible so as to not waive the issuer's right to demand strict compliance with the terms of the credit. *Courtaulds N. America, Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92 (M.D.N.C.),

rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

An issuer bank is bound by a promise in a letter of credit, which may be enforced by a person acting in strict compliance and on good faith thereof, and the bank cannot escape liability because of the insolvency of the person to whom the letter is addressed or the customer. *Courtaulds N. America, Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

Beneficiary Must Meet Terms of Credit To Recover from Drawee Bank. — The beneficiary must meet the terms of the credit — and precisely — if it is to exact performance of the issuer. Failing such compliance there can be no recovery from the drawee bank. *Courtaulds N. America, Inc. v. North Carolina Nat'l Bank*, 528 F.2d 802 (4th Cir. 1975).

§ 25-5-114. Issuer's duty and privilege to honor; rights to reimbursement.

A commercial letter of credit is essentially a third-party beneficiary contract by which a party wishing to transact business induces a bank to issue the letter to a third party. It is a contract between the procuring customer and the issuing bank for the benefit of the payee-beneficiary. *Courtaulds N. America, Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

It Is Independent of Contract between Customer and Beneficiary. — Since the letter of credit is essentially a contract between the issuer and the beneficiary, it is recognized by this Article as being independent of the underlying contract between the customer and the beneficiary. *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978).

When Draft Must Be Honored. — In the event the documents appear regular on their face and the documentary demand for payment complies with the terms of the credit, the issuer must honor the draft. *Courtaulds N. America, Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

A reason given for the issuer's stringent duty to honor in spite of alleged infirmities in the underlying contract is that one of the basic purposes of the letter of credit is to eliminate the risk to the beneficiary that the customer will refuse or halt payment because of alleged deficiencies in the beneficiary's performance. *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978).

When an issuer discovers a possible discrepancy, it is incumbent upon it to disclose that fact to the beneficiary as soon as reasonably possible so as to not waive the issuer's right to

demand strict compliance with the terms of the credit. *Courtaulds N. America, Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

All Required Documents Must Be as Stated in Letter of Credit. — A bank is interested only in the documents to be presented and, therefore, the essential requirements of a letter of credit must be strictly complied with by the party entitled to draw against the letter of credit. This means all required documents must be as stated in the letter. *Courtaulds N. America, Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

An issuer bank is bound by a promise in a letter of credit, which may be enforced by a person acting in strict compliance and on good faith thereof, and the bank cannot escape liability because of the insolvency of the person to whom the letter is addressed or the customer. *Courtaulds N. America, Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92 (M.D.N.C.), rev'd on other grounds, 528 F.2d 802 (4th Cir. 1975).

"Fraud in the transaction" under subsection (2) of this section refers to the beneficiary's accompanying his draft with documents or declarations which have absolutely no basis in the facts of the underlying performance. *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978).

A "fraudulent" document presumably is one that is completely forged or drawn up without any underlying basis in fact, one that is but partly spurious or a document which has been materially altered. *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978).

Fraudulent Attachment of Letter of Credit to Negotiable Instrument as Security. — The knowing and intentional attachment of a guaranty letter of credit, as collateral security, to a negotiable instrument which that letter was not intended to secure, and the eventual presentation of these documents to the issuing bank for purposes of honor of the letter of credit, would amount to a presentation of fraudulent documents under subsection (2) of this section. In such a case, though the note may be valid as against other parties to the note, the documents, considered as a whole, are nonetheless fraudulent insofar as the letter of credit was not intended to secure that particular note, and the beneficiary had knowledge of this fact. *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978).

When Payment of Draft May Be Enjoined.

— Given the independence of the issuer's obligation to the beneficiary, and the commercial purposes which this independent obligation serves, it would appear that an injunction should issue to enjoin payment of a draft only in those instances where there is some action by the

beneficiary which vitiates the transaction between the beneficiary and the issuer. *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978).

Since the transaction between the beneficiary and the issuer is one consisting of an exchange of documents, only some defect in these documents would justify an injunction against honor. Subsection (2) of this section speaks to those defects in documents which are not apparent on the face of the documents, and permits dishonor or the issue of an injunction only in situations where the documents presented are themselves the product of some sort of fraud. Accordingly, the beneficiary's fraud on the customer in the inducement of their separate contract would not justify dishonor or an injunction, nor would a breach of warranty or defect in the quality of the goods delivered pursuant to the underlying contract, for these defects are not of the sort which relate to the contract between the issuer and beneficiary. *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978).

§ 25-5-116. Transfer and assignment.

(2) Even though the credit specifically states that it is nontransferable or nonassignable the beneficiary may before performance of the conditions of the credit assign his right to proceeds. Such an assignment is an assignment of an account under article 9 on secured transactions and is governed by that article except that

(a) the assignment is ineffective until the letter of credit or advice of credit is delivered to the assignee which delivery constitutes perfection of the security interest under article 9; and

(b) the issuer may honor drafts or demands for payment drawn under the credit until it receives a notification of the assignment signed by the beneficiary which reasonably identifies the credit involved in the assignment and contains a request to pay the assignee; and

(c) after what reasonably appears to be such a notification has been received the issuer may without dishonor refuse to accept or pay even to a person otherwise entitled to honor until the letter of credit or advice of credit is exhibited to the issuer.

(1975, c. 862, s. 5.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, substituted "of an account" for "of a contract right" near the beginning of the second sentence in subsection (2).

As the rest of the section was not changed by the amendment, only subsection (2) is set out.

§ 25-5-117. Insolvency of bank holding funds for documentary credit. — (1) Where an issuer or an advising or confirming bank or a bank which has for a customer procured issuance of a credit by another bank becomes insolvent before final payment under the credit and the credit is one to which this article is made applicable by paragraphs (a) or (b) of § 25-5-102 (1) on scope, the receipt or allocation of funds or collateral to secure or meet obligations under the credit shall have the following results:

(a) to the extent of any funds or collateral turned over after or before the insolvency as indemnity against or specifically for the purpose of payment of drafts or demands for payment drawn under the designated credit, the drafts or demands are entitled to payment in preference over depositors or other general creditors of the issuer or bank; and

(b) on expiration of the credit or surrender of the beneficiary's rights under it unused any person who has given such funds or collateral is similarly entitled to return thereof; and

(c) a charge to a general or current account with a bank if specifically consented to for the purpose of indemnity against or payment of drafts or demands for payment drawn under the designated credit falls under the same rules as if the funds had been drawn out in cash and then turned over with specific instructions.

(1967, c. 24, s. 11.)

Editor's Note. —

The 1967 amendment, originally effective Oct. 1, 1967, substituted "charge" for "change" near the beginning of paragraph (c) of subsection (1). Session Laws 1967, c. 1078, amends the 1967

amendatory act so as to make it effective July 1, 1967.

As the rest of the section was not changed by the amendment, only subsection (1) is set out.

ARTICLE 6.

Bulk Transfers.

§ 25-6-101. Short title.

Editor's Note. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

§ 25-6-106: Repealed by Session Laws 1967, c. 562, s. 1, effective at midnight June 30, 1967.

Cross Reference. — See Editor's note to § 25-1-201.

§ 25-6-107. The notice.

(2) If the debts of the transferor are not to be paid in full as they fall due or if the transferee is in doubt on that point then the notice shall state further:

(a) the location and general description of the property to be transferred and the estimated total of the transferor's debts;

(b) the address where the schedule of property and list of creditors (§ 25-6-104) may be inspected;

(c) whether the transfer is to pay existing debts and if so the amount of such debts and to whom owing;

(d) whether the transfer is for new consideration and if so the amount of such consideration and the time and place of payment; and

(e) repealed by Session Laws 1967, c. 562, s. 1, effective at midnight June 30, 1967.

(1967, c. 562, s. 1.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, repealed paragraph (e) of subsection (2). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, it is not set out.

§ 25-6-108. Auction sales; "auctioneer."

(3) The person or persons other than the transferor who direct, control or are responsible for the auction are collectively called the "auctioneer." The auctioneer shall:

(a) receive and retain the list of creditors and prepare and retain the schedule of property for the period stated in this article (§ 25-6-104);

(b) give notice of the auction personally or by registered or certified mail at least ten days before it occurs to all persons shown on the list of creditors and to all other persons who are known to him to hold or assert claims against the transferor; and

(c) repealed by Session Laws 1967, c. 562, s. 1, effective at midnight June 30, 1967.

(1967, c. 562, s. 1.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, repealed paragraph (c) of subsection (3). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, it is not set out.

§ 25-6-109. What creditors protected. — (1) The creditors of the transferor mentioned in this article are those holding claims based on transactions or events occurring before the bulk transfer, but creditors who become such after notice to creditors is given (§§ 25-6-105 and 25-6-107) are not entitled to notice.

(2) Repealed by Session Laws 1967, c. 562, s. 1, effective at midnight June 30, 1967. (1907, c. 623; 1913, c. 30, s. 1; Ex. Sess., 1913, c. 66, s. 1; C. S., s. 1013; 1933, c. 190; 1945, c. 635; 1963, c. 1179; 1965, c. 700, s. 1; 1967, c. 562, s. 1.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, repealed subsection (2). See Editor's note to § 25-1-201.

ARTICLE 7.

Warehouse Receipts, Bills of Lading and Other Documents of Title.

PART 1.

GENERAL.

§ 25-7-101. Short title.

Editor's Note. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

§ 25-7-102. Definitions and index of definitions.

Warehouseman Bears Risk That Agent May Issue Improper Receipts. — Section 25-7-203, coupled with the definition of issuer under (1)(g) of this section, clearly places upon the

warehouseman the risk that his agent may fraudulently or mistakenly issue improper receipts. The theory of the law is that the warehouseman, being in the best position to prevent the issuance of mistaken or fraudulent

receipts, should be obligated to do so; that such receipts are a risk and cost of the business enterprise which the issuer is best able to absorb. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

§ 25-7-104. Negotiable and nonnegotiable warehouse receipt, bill of lading or other document of title.

Applied in *Branch Banking & Trust Co. v. Gill*, 286 N.C. 342, 211 S.E.2d 327 (1975); *Branch*

Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

PART 2.

WAREHOUSE RECEIPTS: SPECIAL PROVISIONS.

§ 25-7-203. Liability for non-receipt or misdescription.

Editor's Note. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

The purpose of this section is to protect specified parties to or purchasers of warehouse receipts by imposing liability upon the warehouseman when either he or his agent fraudulently or mistakenly issues receipts (negotiable or nonnegotiable) for misdescribed or nonexistent goods. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Applicability of Section. — This section covers the situation where the sole question is: Under what circumstances and to whom is an issuer liable for the issuance of warehouse receipts when it has not received the goods which the receipts purportedly cover? *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Parties May Not Keep Themselves in Ignorance of Facts. — Albeit "good faith" is literally defined as "honesty in fact in the conduct or transaction concerned," the Uniform Commercial Code does not permit parties to intentionally keep themselves in ignorance of facts which, if known, would defeat their rights in a negotiable document of title. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

No Requirement to Take Documents through "Due Negotiation". — This section contains no requirement that the purchaser take negotiable documents through "due

negotiation" before he can recover from the issuer. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Warehouseman Bears Risk That Agent May Issue Improper Receipts. — This section coupled with the definition of issuer under § 25-7-102(1)(g), clearly places upon the warehouseman the risk that his agent may fraudulently or mistakenly issue improper receipts. The theory of the law is that the warehouseman, being in the best position to prevent the issuance of mistaken or fraudulent receipts, should be obligated to do so; that such receipts are a risk and cost of the business enterprise which the issuer is best able to absorb. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Claimant's Burden of Proof. — To be entitled to recover under this section, claimant has the burden of proving that he: (1) is a party to or purchaser of a document of title other than a bill of lading; (2) gave value for the document; (3) took the document in good faith; (4) relied to his detriment upon the description of the goods in the document; and (5) took without notice that the goods were misdescribed or were never received by the issuer. Many of these terms are defined in § 25-1-201 and those definitions are also made applicable to Article 7, § 25-7-102(4). *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

§ 25-7-209. Lien of warehouseman.

(3) (a) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them

by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under § 25-7-503.

(b) A warehouseman's lien on household goods for charges and expenses in relation to the goods under subsection (1) is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. "Household goods" means furniture, furnishings and personal effects used by the depositor in a dwelling.

(c) Where the holder of a security interest with respect to the property stored, or any part thereof, has instituted appropriate legal proceedings for the recovery of possession of property, such holder shall be entitled to possession under the writ or other process upon payment of a fair fractional portion of the total storage charges reasonably allocable to the storage of the property described in the writ or other process.

(1967, c. 562, s. 1.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, designated the former provisions of subsection (3) as paragraph (a) and added paragraphs (b) and (c) to subsection (3). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (3) is set out.

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

§ 25-7-210. Enforcement of warehouseman's lien.

A Warehouseman with Liens Pursuant to Both Article 1 of Chapter 44A of the General Statutes and Article 7 of the Uniform Commercial Code May Enforce His Lien Pursuant to G.S. § 25-7-210 Without Allowing

the Owner a Judicial Hearing Pursuant to G.S. § 44A-4. — See opinion of Attorney General to Resa L. Harris, Legal Officer, Office of the Clerk of Superior Court, Mecklenburg County, 48 N.C.A.G. 2 (1979).

PART 3.

BILLS OF LADING: SPECIAL PROVISIONS.

§ 25-7-301. Liability for non-receipt or misdescription; "said to contain"; "shipper's load and count"; improper handling.

(4) The issuer may by inserting in the bill the words "shipper's weight, load and count" or other words of like purport indicate that the goods were loaded by the shipper; and if such statement be true the issuer shall not be liable for damages caused by the improper loading. But their omission does not imply liability for such damages.

(1967, c. 24, s. 12.)

Editor's Note. —

The 1967 amendment, originally effective Oct. 1, 1967, substituted "by" for "be" near the beginning of subsection (4). Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

As the rest of the section was not changed by the amendment, only subsection (4) is set out.

Quoted in Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

§ 25-7-307. Lien of carrier.

Editor's Note. — For article concerning liens on personal property not governed by the

Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

PART 5.

WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER.

§ 25-7-501. Form of negotiation and requirements of "due negotiation."

Applied in *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Quoted in *Branch Banking & Trust Co. v. Gill*, 286 N.C. 342, 211 S.E.2d 327 (1975).

§ 25-7-502. Rights acquired by due negotiation.

Editor's Note. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

Determining Priority of Claims. — In situations where there are actual goods, and there are conflicting claims either to them or to the documents, this section and §§ 25-7-503 and 25-7-504 determine the priority of these claims. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

For hypothetical examples of the manner in which this section and § 25-7-504 are intended to work in determining the priorities of competing claims, see *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

The primary purpose of this section and § 25-7-504 is to determine the priority of competing claims to valid documents and goods actually stored in a warehouse and to determine the issuer's liability for a misdelivery of goods actually received by it. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Generally, a holder of negotiable warehouse receipts acquired through "due negotiation" will receive paramount title not only to the documents but also to the goods represented by

them, the purpose of Uniform Commercial Code, Article 7, Part 5, being to facilitate the negotiability and integrity of negotiable receipts. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Purchase of Warehouse Receipt without Knowledge of Lien Senior in Time. — Under § 105-241, a lien for State taxes on personal property is not enforceable against a bona fide purchaser for value, except upon a levy upon such property under an execution or a tax warrant; but when a tax lien is perfected, it is, by § 105-376 (c), superior to all other liens or rights prior or subsequent in time. By subsection (1) (c) of this section a bona fide purchaser of a warehouse receipt acquires good title against a lien senior in time of which the purchaser had no notice. Thus, an enforceable lien on oil stored in North Carolina would not arise until it was executed on; but it could not be attached when a warehouse receipt therefor was in the hands of one who purchased it not knowing of the lien. *Davenport v. Ralph N. Peters & Co.*, 386 F.2d 199 (4th Cir. 1967).

§ 25-7-503. Document of title to goods defeated in certain cases.

Determining Priority of Claims. — In situations where there are actual goods, and there are conflicting claims either to them or to the documents, §§ 25-7-502 through 25-7-504

determine the priority of these claims. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

§ 25-7-504. Rights acquired in the absence of due negotiation; effect of diversion; seller's stoppage of delivery.

Editor's Note. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

Determining Priority of Claims. — In situations where there are actual goods, and there are conflicting claims either to them or to the documents, §§ 25-7-502 through 25-7-504 determine the priority of these claims. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

For hypothetical examples of the manner in which this section and § 25-7-502 are intended to work in determining the priorities of competing claims, see *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

The primary purpose of this section and § 25-7-502 is to determine the priority of competing claims to valid documents and goods actually stored in a warehouse and to determine the issuer's liability for a misdelivery of goods

actually received by it. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Generally, a holder of negotiable warehouse receipts acquired through "due negotiation" will receive paramount title not only to the documents but also to the goods represented by them, the purpose of Uniform Commercial Code,

Article 7, Part 5, being to facilitate the negotiability and integrity of negotiable receipts. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Quoted in Branch Banking & Trust Co. v. Gill, 286 N.C. 342, 211 S.E.2d 327 (1975).

§ 25-7-506. Delivery without indorsement; right to compel indorsement.

Editor's Note. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

Applied in Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Quoted in Branch Banking & Trust Co. v. Gill, 286 N.C. 342, 211 S.E.2d 327 (1975).

PART 6.

WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS.

§ 25-7-602. Attachment of goods covered by a negotiable document.

Attachment against Property in Possession of Warehouseman. — North Carolina law does not permit an attachment against property in the possession of a warehouseman who has issued a

negotiable warehouse receipt therefor, unless the receipt is first surrendered or its negotiation enjoined. Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967).

ARTICLE 8.

Investment Securities.

PART 1.

SHORT TITLE AND GENERAL MATTERS.

§ 25-8-101. Short title.

Editor's Note. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

§ 25-8-102. Definitions and index of definitions.

(3) A "clearing corporation" is a corporation

(a) at least ninety percent (90%) of the capital stock of which is held by or for one or more persons (other than individuals), each of whom

(i) is subject to supervision or regulation pursuant to the provisions of federal or State banking laws or State insurance laws, or

(ii) is a broker or dealer or investment company registered under the Securities Exchange Act of 1934 or the Investment Company Act of 1940, or

(iii) is a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934, and none of whom, other than a national securities exchange or association, holds in excess of twenty percent (20%) of the capital stock of such corporation; and

(b) any remaining capital stock of which is held by individuals who have purchased such capital stock at or prior to the time of their taking office as directors of such corporation and who have purchased only so much of such capital stock as may be necessary to permit them to qualify as such directors. (1973, c. 497, s. 3.)

Editor's Note. — The 1973 amendment rewrote subdivision (3).

As the rest of the section was not changed by the amendment, only subdivision (3) is set out.

§ 25-8-106. Applicability.

Editor's Note. — For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).

PART 2.

ISSUE — ISSUER.

§ 25-8-204. Effect of issuer's restrictions on transfer.

Editor's Note. — For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).

PART 3.

PURCHASE.

§ 25-8-301. Rights acquired by purchaser; "adverse claim"; title acquired by bona fide purchaser.

Editor's Note. — For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).

§ 25-8-309. Effect of indorsement without delivery.

The elements of a gift inter vivos are: (1) The intent by the owner to give to the donee the shares of stock so as to divest himself immediately of all right and title to and control of the stock; and (2) the delivery, actual or constructive, of the stock certificate indorsed by him. *Fesmire v. First Union Nat'l Bank*, 267 N.C. 589, 148 S.E.2d 589 (1966) (decided under the Uniform Stock Transfer Act).

Possession of Indorsed Certificate Held to Establish Delivery Prima Facie. — Delivery of an indorsed stock certificate is constructive delivery of the shares which it represents, and possession of such certificate by the indorsee establishes prima facie the fact of delivery. *Fesmire v. First Union Nat'l Bank*, 267 N.C. 589, 148 S.E.2d 589 (1966) (decided under the Uniform Stock Transfer Act).

§ 25-8-311. Effect of unauthorized indorsement.

Editor's Note. — For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

Bona Fide Purchaser Held to Take Free of Lack of Authority. — Under the Uniform Stock

Transfer Act an unlimited indorsement and delivery of a certificate of stock to another, or the delivery of it to him together with a separate document containing a written assignment or a

power of attorney to him for the transfer of the stock, clothed such other with indicia of ownership, and a bona fide purchaser for value took the shares free from any lack of actual authority. *Patterson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 266 N.C. 489, 146 S.E.2d 390 (1966).

Status as Bona Fide Purchaser as Affirmative Defense. — Subdivision (2) a of former § 55-81 set up an affirmative defense which had to be pleaded and proved by the defendant, just as one claiming to be the holder in due course of a negotiable instrument must prove he has that status when it is shown that the person from whom he acquired the

instrument negotiated it in breach of faith. *Patterson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 266 N.C. 489, 146 S.E.2d 390 (1966).

No Right of Action against Broker. — While Article 8 confers on the true owner of securities which have been transferred upon an unauthorized endorsement, remedies against the issuer in this section and against the ultimate purchaser in § 25-8-315 and subsection (a) of this section, it does not appear that Article 8 provides any right of action in favor of the owner against the broker who consummated the transfer. *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

§ 25-8-315. Action against purchaser based upon wrongful transfer.

No Right of Action against Broker. — While Article 8 confers on the true owner of securities which have been transferred upon an unauthorized endorsement, remedies against the issuer in § 25-8-311, and against the ultimate purchaser in this section and § 25-8-311(a), it

does not appear that Article 8 provides any right of action in favor of the owner against the broker who consummated the transfer. *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

§ 25-8-318. No conversion by good faith delivery.

Defendant Has Burden to Present Evidence of Good Faith. — While this section purports to protect a broker who transfers securities at the insistence of a principal who has no right to dispose of them, its protection is only available as a defense with the burden on the defendant to

present evidence that it acted in good faith and in accordance with reasonable commercial standards. *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

§ 25-8-319. Statute of frauds.

Editor's Note. — For article on statute of frauds as to personal property under the Uniform Commercial Code, see 4 Wake Forest Intra. L. Rev. 41 (1968). For survey of 1977

commercial law, see 56 N.C.L. Rev. 915 (1978).

Cited in *Turner v. Atlantic Mtg. & Inv. Co.*, 32 N.C. App. 565, 233 S.E.2d 80 (1977).

PART 4.

REGISTRATION.

§ 25-8-401. Duty of issuer to register transfer.

Editor's Note. — For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).

§ 25-8-403. Limited duty of inquiry.

(4) Neither this section nor this Article shall be construed to repeal the provisions of Article 2 of Chapter 32 entitled the Uniform Act for the Simplification of Fiduciary Security Transfers, and if there is in any respect an

inconsistency between Article 2 of Chapter 32 and this Article the provisions of the former shall control. (1965, c. 700, s. 1; 1977, c. 814, s. 9.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, added subsection (4).

As the rest of the section was not changed by the amendment, only subsection (4) is set out.

§ 25-8-405. Lost, destroyed and stolen securities.

Cross Reference. — See § 55-57(e), which, under certain circumstances, permits a

corporation to issue a replacement certificate without requiring a bond.

§ 25-8-406. Duty of authenticating trustee, transfer agent or registrar.

Editor's Note. — For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).

§ 25-8-407: Repealed by Session Laws 1969, c. 1115, s. 1, effective at midnight, June 30, 1969.

Cross Reference. — For present section containing the provisions of the repealed section, see § 41-2.2.

ARTICLE 9.

Secured Transactions; Sales of Accounts and Chattel Paper.

PART 1.

SHORT TITLE, APPLICABILITY AND DEFINITIONS.

§ 25-9-101. Short title. — This article shall be known and may be cited as Uniform Commercial Code — Secured Transactions. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

(1966). For case law survey as to credit transactions, see 44 N.C.L. Rev. 956 (1966).

For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525

§ 25-9-102. Policy and subject matter of article. — (1) Except as otherwise provided in G.S. 25-9-104 on excluded transactions, this article applies

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also

(b) to any sale of accounts or chattel paper.

(2) This article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This article does not apply to statutory liens except as provided in G.S. 25-9-310.

(3) The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, rewrote the introductory paragraph of subsection (1), substituted "or accounts" for "accounts or contract paper" in paragraph (1)(a) and deleted "contract rights" following "accounts" in paragraph (1)(b).

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966). For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

Security Interest Replaces Chattel Mortgages. — An Article 9 security interest by the terms of the Uniform Commercial Code replaces the older chattel mortgage as a method of protecting the creditor. *Montford v. Grohman*, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Quoted in *Szabo Food Serv., Inc. v. Balentine's, Inc.*, 285 N.C. 452, 206 S.E.2d 242 (1974).

§ 25-9-103. Perfection of security interests in multiple-state transactions.

— (1) Documents, Instruments and Ordinary Goods. —

(a) This subsection applies to documents and instruments and to goods other than those covered by a certificate of title described in subsection (2), mobile goods described in subsection (3), and minerals described in subsection (5).

(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

(c) If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or nonperfection of the security interest from the time it attaches until 30 days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the 30-day period.

(d) When collateral is brought into and kept in this State while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by part 3 of this article to perfect the security interest,

(i) if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this State, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;

(ii) if the action is taken before the expiration of the period specified in subparagraph (i), the security interest continues perfected thereafter;

(iii) for the purpose of priority over a buyer of consumer goods (subsection (2) of G.S. 25-9-307), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in subparagraphs (i) and (ii).

(2) Certificate of Title. —

(a) This subsection applies to goods covered by a certificate of title issued under a statute of this State or of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection.

(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection of the security interest are governed by the law

(including the conflict of laws rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title within the meaning of this section.

(c) Except with respect to the rights of a buyer described in the next paragraph, a security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into this State and thereafter covered by a certificate of title issued by this State is subject to the rules stated in paragraph (d) of subsection (1).

(d) If goods are brought into this State while a security interest therein is perfected in any manner under the law of the jurisdiction from which the goods are removed and a certificate of title is issued by this State and the certificate does not show that the goods are subject to the security interest or that they may be subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest.

(3) Accounts, General Intangibles and Mobile Goods. —

(a) This subsection applies to accounts (other than an account described in subsection (5) on minerals) and general intangibles and to goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road-building and construction machinery and commercial harvesting machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in subsection (2).

(b) The law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or nonperfection of the security interest.

(c) If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or nonperfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.

(d) A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the Federal Aviation Act of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.

(e) A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.

(4) Chattel Paper. — The rules stated for goods in subsection (1) apply to a possessory security interest in chattel paper. The rules stated for accounts in subsection (3) apply to a nonpossessory security interest in chattel paper, but the security interest may not be perfected by notification to the account debtor.

(5) Minerals. — Perfection and the effect of perfection or nonperfection of a security interest which is created by a debtor who has an interest in minerals or the like (including oil and gas) before extraction and which attaches thereto as extracted, or which attaches to an account resulting from the sale thereof at the wellhead or minehead, are governed by the law (including the conflict of laws rules) of the jurisdiction wherein the wellhead or minehead is located. (1945, c. 196, s. 2; 1957, c. 564; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. —

The 1967 amendment, effective at midnight June 30, 1967, made a change in subsection (2) as it stood before the 1975 amendment. See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, rewrote this section.

§ 25-9-104. Transactions excluded from article. — This article does not apply

(a) to a security interest subject to any statute of the United States to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or

(b) to a landlord's lien; or

(c) to a lien given by statute or other rule of law for services or materials except as provided in G.S. 25-9-310 on priority of such liens; or

(d) to a transfer of a claim for wages, salary or other compensation of an employee; or

(e) to a transfer by a government or governmental subdivision or agency; or

(f) to a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to any assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a preexisting indebtedness; or

(g) to a transfer of an interest in or claim in or under any policy of insurance, except as provided with respect to proceeds (G.S. 25-9-306) and priorities in proceeds (G.S. 25-9-312); or

(h) to a right represented by a judgment (other than a judgment taken on a right to payment which was collateral); or

(i) to any right of setoff; or

(j) except to the extent that provision is made for fixtures in G.S. 25-9-313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or

(k) to a transfer in whole or in part of any claim arising out of tort; or

(l) to a transfer of an interest in any deposit account (subsection (l) of G.S. 25-9-105), except as provided with respect to proceeds (G.S. 25-9-306) and priorities in proceeds (G.S. 25-9-312). (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Cross References. — As to application of Article 9 of the North Carolina Uniform Commercial Code to transactions under Chapter 159D, the North Carolina Industrial and Pollution Control Facilities Federal Program Financing Act, see § 159D-23. As to application of this Article to transactions under Chapter

159C, the Industrial Pollution Control Facilities Financing Act, see § 159C-28.

Editor's Note. — The 1975 amendment, effective July 1, 1976, deleted "such as the Ship Mortgage Act, 1920" following "United States" in subsection (a), substituted present subsection (e) for a provision which read "to an equipment

trust covering railway rolling stock; or," rewrote subsection (f), added the exception clause in subsection (g) and the clause in parentheses in subsection (h), rewrote subsection (k) so as to eliminate a provision excluding "any deposit, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization," and added subsection (l).

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

The phrase "landlord's lien" is construed to refer to liens created by statute. A detailed reading of this section (the section excluding certain types of transactions from the Code) in its entirety, together with the comments of the National Conference of Commissioners of Uniform State Laws, indicates that all of the other subsections deal with matters thought to be sufficiently covered by a statute of the United States or of the several states or that they deal

with special transactions which do not fit easily into general commercial statute and which are adequately covered by existing law. From this viewpoint it also appears that the term "landlord's lien" as used in the statute must be interpreted as referring to liens created by statute, for the matter of liens on property is obviously considered by all of the remainder of the Code as fitting into a general commercial statute. *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

This section's exclusion of landlord's liens is not applicable to consensual liens. *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

A lien on personal property granted a lessor by contract is not excluded from the provisions of the Uniform Commercial Code. *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

§ 25-9-105. Definitions and index of definitions. — (1) In this article unless the context otherwise requires:

(a) "Account debtor" means the person who is obligated on an account, chattel paper or general intangible;

(b) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, but a charter or other contract involving the use or hire of a vessel is not chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

(c) "Collateral" means the property subject to a security interest, and includes accounts and chattel paper which have been sold;

(d) "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of a collateral in any provision of the article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires;

(e) "Deposit account" means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit;

(f) "Document" means document of title as defined in the general definitions of article 1 (G.S. 25-1-201), and a receipt of the kind described in subsection (2) of G.S. 25-7-201;

(g) "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests;

(h) "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (G.S. 25-9-313), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction. "Goods" also includes standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals, and growing crops;

(i) "Instrument" means a negotiable instrument (defined in G.S. 25-3-104), or a security (defined in G.S. 25-8-102) or any other writing which evidences a right

to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment;

(j) "Mortgage" means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like;

(k) An advance is made "pursuant to commitment" if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relieve him from his obligation;

(l) "Security agreement" means an agreement which creates or provides for a security interest;

(m) "Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party.

(2) Other definitions applying to this article and the sections in which they appear are:

"Account." (G.S. 25-9-106).

"Attach." (G.S. 25-9-203).

"Construction mortgage." (G.S. 25-9-313(1)).

"Consumer goods." (G.S. 25-9-109(1)).

"Equipment." (G.S. 25-9-109(2)).

"Farm products." (G.S. 25-9-109(3)).

"Fixture." (G.S. 25-9-313(1)).

"Fixture filing." (G.S. 25-9-313(1)).

"General intangibles." (G.S. 25-9-106).

"Inventory." (G.S. 25-9-109(4)).

"Lien creditor." (G.S. 25-9-301(3)).

"Proceeds." (G.S. 25-9-306(1)).

"Purchase money security interest." (G.S. 25-9-107).

"United States." (G.S. 25-9-103).

(3) The following definitions in other articles apply to this article:

"Check." (G.S. 25-3-104).

"Contract for sale." (G.S. 25-2-106).

"Holder in due course." (G.S. 25-3-302).

"Note." (G.S. 25-3-104).

"Sale." (G.S. 25-2-106).

(4) In addition article 1 contains general definitions and principles of construction and interpretation applicable throughout this article. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, added, at the end of the first sentence of paragraph (b) of subsection (1), "a charter or other contract involving the use or hire of a vessel is not chattel paper." See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, eliminated references to contract rights in paragraphs (a), (c) and (d) and present paragraph (m) of subsection (1), inserted "but" near the middle of the first sentence of paragraph (b) of subsection (1), added present paragraphs (e), (g), (j) and (k) in subsection (1) and redesignated former paragraphs (e), (f), (g), (h) and (i) as (f), (h), (i), (l) and (m), respectively, added the language beginning "and a receipt" at the end of

present paragraph (f) and substituted the language beginning "or minerals" for "contract rights and other things in action" at the end of the first sentence and inserted the provision as to standing timber in the second sentence of present paragraph (h). In subsection (2), the amendment deleted a reference to contract rights and added the references to "attach," "construction mortgage," "fixture," "fixture filing" and "United States."

"Security Agreement." — Any written agreement signed by a debtor which recites that certain personalty is being encumbered as security for a debt ought to operate as a security agreement under subsection (1)(l) of this section. *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

Some Grant of Security Interest Required. — A reading of the definition of “security agreement” in this section suggests that some grant of a security interest is required. *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120, rev'd on other grounds, 279 N.C. 352, 183 S.E.2d 109 (1971).

Applied in *EAC Credit Corp. v. Wilson*, 281 N.C. 140, 187 S.E.2d 752 (1972); *Old S. Life Ins. Co. v. Bank of N.C.*, 36 N.C. App. 18, 244 S.E.2d 264 (1978).

Quoted in *Szabo Food Serv., Inc. v. Balentine's, Inc.*, 285 N.C. 452, 206 S.E.2d 242 (1974).

§ 25-9-106. Definitions: “Account”; “general intangibles”. — “Account” means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. “General intangibles” means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts. (1945, c. 196, s. 1; 1957, c. 504; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, added the last sentence. See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, added “whether or not it has been earned by performance” at the end of the first sentence, deleted the second sentence, which defined

“contract right,” deleted “contract rights” preceding “chattel paper” in the present second sentence, added “and money” at the end of that sentence and substituted “are accounts” for “are contract rights and neither accounts nor general intangibles” at the end of the last sentence.

§ 25-9-107. Definitions: “Purchase money security interest”. — A security interest is a “purchase money security interest” to the extent that it is

(a) taken or retained by the seller of the collateral to secure all or part of its price; or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Applied in *North Carolina Nat'l Bank v. Holshouser*, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

§ 25-9-108. When after-acquired collateral not security for antecedent debt. — Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-109. Classification of goods: “Consumer goods”; “equipment”; “farm products”; “inventory”. — Goods are

(1) “consumer goods” if they are used or bought for use primarily for personal, family or household purposes;

(2) "equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

(3) "farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory;

(4) "inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

For article on waiver of defense clauses in consumer contracts, see 48 N.C.L. Rev. 545 (1970). For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

Bound Volumes Held "Inventory." — Where the buyer was engaged in the business of

microfilming books, journals, records, and other like material, and in buying and selling both microfilm records and printed material, the bound volumes sold to the buyer were "inventory," and not "equipment." *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850, cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

§ 25-9-110. Sufficiency of description. — For the purposes of this article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-111. Applicability of bulk transfer laws. — The creation of a security interest is not a bulk transfer under article 6 (see G.S. 25-6-103). (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-112. Where collateral is not owned by debtor. — Unless otherwise agreed, when a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral is entitled to receive from the secured party any surplus under G.S. 25-9-502(2) or under G.S. 25-9-504(1), and is not liable for the debt or for any deficiency after resale, and he has the same right as the debtor

(a) to receive statements under G.S. 25-9-208;

(b) to receive notice of and to object to a secured party's proposal to retain the collateral in satisfaction of the indebtedness under G.S. 25-9-505;

(c) to redeem the collateral under G.S. 25-9-506;

(d) to obtain injunctive or other relief under G.S. 25-9-507(1); and

(e) to recover losses caused to him under G.S. 25-9-208(2). (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-113. Security interests arising under article on sales. — A security interest arising solely under the article on sales (article 2) is subject to the provisions of this article except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods

(a) no security agreement is necessary to make the security interest enforceable; and

(b) no filing is required to perfect the security interest; and

(c) the rights of the secured party on default by the debtor are governed by the article on sales (article 2). (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Cited in *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976).

§ 25-9-114. Consignment. — (1) A person who delivers goods under a consignment which is not a security interest and who would be required to file under this article by paragraph (3)(c) of G.S. 25-2-326 has priority over a secured party who is or becomes a creditor of the consignee and who would have a perfected security interest in the goods if they were the property of the consignee, and also has priority with respect to identifiable cash proceeds received on or before delivery of the goods to a buyer, if

(a) the consignor complies with the filing provision of the article on sales with respect to consignments (paragraph (3)(c) of G.S. 25-2-326) before the consignee receives possession of the goods; and

(b) the consignor gives notification in writing to the holder of the security interest if the holder has filed a financing statement covering the same types of goods before the date of the filing made by the consignor; and

(c) the holder of the security interest receives the notification within five years before the consignee receives possession of the goods; and

(d) the notification states that the consignor expects to deliver goods on consignment to the consignee, describing the goods by item or type.

(2) In the case of a consignment which is not a security interest and in which the requirements of the preceding subsection have not been met, a person who delivers goods to another is subordinate to a person who would have a perfected security interest in the goods if they were the property of the debtor. (1975, c. 862, s. 7.)

Editor's Note. — Session Laws 1975, c. 862, s. 10, makes the act effective July 1, 1976.

For a note on consignments and the consignor's duty to satisfy public notice

requirements, see 13 Wake Forest L. Rev. 507 (1977).

PART 2.

VALIDITY OF SECURITY AGREEMENT AND RIGHTS OF
PARTIES THERETO.

§ 25-9-201. **General validity of security agreement.** — Except as otherwise provided by this Chapter a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. Nothing in this article validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Cited in Dunham's Music House, Inc. v. Asheville Theatres, Inc., 10 N.C. App. 242, 178 S.E.2d 124 (1970); Love v. Bache & Co., 40 N.C. App. 617, 253 S.E.2d 351 (1979).

§ 25-9-201.1: Repealed by Session Laws 1975, c. 862, s. 6, effective July 1, 1976.

Editor's Note. — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See Editor's note to § 25-1-201.

§ 25-9-202. **Title to collateral immaterial.** — Each provision of this article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Quoted in Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974).

Cited in Moser v. Employers Com. Union Ins. Co. of America, 25 N.C. App. 309, 212 S.E.2d 664 (1975); Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219 (1978).

§ 25-9-203. **Attachment and enforceability of security interest; proceeds; formal requisites.** — (1) Subject to the provisions of G.S. 25-4-208 on the security interest of a collecting bank and G.S. 25-9-113 on a security interest arising under the article on sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; and

(b) value has been given; and

(c) the debtor has rights in the collateral.

(2) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in subsection (1) have taken place unless explicit agreement postpones the time of attaching.

(3) Unless otherwise agreed a security agreement gives the secured party the rights to proceeds provided by G.S. 25-9-306.

(4) A transaction, although subject to this article, is also subject to the North Carolina Consumer Finance Act (being G.S. 53-164 through 53-191), G.S. 24-1 and 24-2, and G.S. 91-1 through 91-8, the Retail Installment Sales Act (being Chapter 25A of the North Carolina General Statutes), and in the case of conflict between the provisions of this article and any such statute, the provisions of such statute control. Failure to comply with any applicable statute has only the effect which is specified therein. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 2; c. 196, s. 2; 1955, c. 386, s. 1; c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, revised the first sentence of former subsection (2) so as to clarify the section references therein. See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, rewrote this section.

For article on statute of frauds as to personal property under the Uniform Commercial Code, see 4 Wake Forest Intra. L. Rev. 41 (1968). For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

Subsection (1)(a) Writing Requirement in Nature of Statute of Frauds. — The requirement that the bargain be reduced to writing before it becomes effective is in the nature of a statute of frauds. *Little v. County of Orange*, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

Writings May Be Incorporated to Satisfy Requirement. — As in other contracts involving a statute of frauds, two or more writings can be incorporated to satisfy the requirements of subsection (1)(a). *Little v. County of Orange*, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

And Writing Need Not Be Denominated Security Agreement. — So long as there is written language which makes and evinces the bargain, it does not matter that the writing is not denominated a security agreement. *Little v. County of Orange*, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

Instrument Must Manifest Intention to Create Security Interest. — There must be language in the instrument which leads to the logical conclusion that it was the intention of the parties that a security interest be created. *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

The Code distinguishes between a security agreement and a financing statement. The security agreement is a writing which (1) creates or provides for a security interest; (2) contains a description of the collateral, plus a description of the land involved when the security interest covers crops or oil, gas or minerals to be extracted or timber to be cut; and (3) is signed by the debtor. The financing statement is a writing which (1) contains the signature and addresses

of both the debtor and creditor and (2) a description of the collateral plus a description of the land involved when the financing statement covers crops growing or to be grown or goods which are or are to become fixtures. *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

Although the Code contemplates the execution of two separate writings, it does not prohibit the combination of a security agreement and financing statement. *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

A financing statement does not ordinarily create a security interest; it merely gives notice that one is or may be claimed. *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

A financing statement which does no more than meet the requirements of § 25-9-402 will not create a security interest in the debtor's property. *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

But a financing statement may double as a security agreement if it contains appropriate language which grants a security interest. *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

A financing statement standing alone can serve as a sufficient memorandum of the security agreement. *Little v. County of Orange*, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

If the financing statement contains the elements for a security agreement in addition to those for the financing statement, it would serve as the security agreement. The additional elements would be (1) something to indicate agreement; (2) a statement of the obligation or obligations secured; and, (3) provision for or creation of the security interest. *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

Where the financing statement contains language clearly manifesting the debtor's intent to grant, create, and provide for a security interest, bears his signature, describes the obligation secured, the collateral subject to the security interest, and the land involved, the financing statement meets the requirements of an enforceable security agreement and serves the double purpose. *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

Although the financing statement need only be a skeletal statement that the parties intend to engage in future transactions which may never be consummated, § 25-9-402(1) specifically provides that "a copy of the security agreement is sufficient as a financing statement" if it contains the required information and is signed by both parties. There is no sound reason why a financing statement may not also serve as a security agreement if it meets the requirements of § 25-9-105(1)(h) and subsection (1)(b) of this section. *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

Financing Statement Sufficient to Provide Security Interest. — Where the financing statement declared that it "covers the following type of collateral: (all crops now growing or to be planted on 5 specified farms) same securing note for advance money to produce crops for the year 1969," and the note contained the statement that it "is secured by Uniform Commercial Code financing statement of North Carolina," the financing statement and the note manifested defendant's intent to create in plaintiff a security interest in the described collateral and he did, in fact, provide for such interest when he stated that the crops described therein secured the note for money advanced to produce these crops. *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

Financing Statement Insufficient to Provide Security Interest. — Where the collateral was

owned by debtor corporation, and the name of that corporation appeared only on one of the three documents, the financing statement, and the financing statement was not signed by any corporate officer of the debtor, no security interest was created because the document was not signed by the debtor in accordance with § 55-36(b). *Little v. County of Orange*, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

"Rights in the collateral" under subsection (1)(c) is a term signifying not title, but merely some rights which may be transferred to the secured party. *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976) (decided under former § 25-9-204).

A debtor may acquire "rights in the collateral" under subsection (1)(c) even where the collateral consists of consigned goods. *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976) (decided under former § 25-9-204).

Security Interest in Lessor Created upon Lessee's Default. — A lease agreement between a lessor and lessee is held to create a security interest in favor of the lessor, upon the lessee's default under the lease, in property that was acquired by the lessee for use on the premises. *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

Applied in Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 244 S.E.2d 510 (1978).

§ 25-9-204. After-acquired property; future advances. — (1) Except as provided in subsection (2), a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral.

(2) No security interest attaches under an after-acquired property clause to consumer goods other than accessions (G.S. 25-9-314) when given as additional security unless the debtor acquired rights in them within 10 days after the secured party gives value.

(3) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment (subsection (1) of G.S. 25-9-105). (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 2; c. 196, s. 1; 1955, c. 386, s. 1; c. 816; 1957, cc. 504, 999; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, made a change in former provisions relating to attachment of security interests in crops. See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, rewrote this section.

For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

The Uniform Commercial Code limits a security interest in after-acquired consumer goods to those acquired within 10 days after the lender gave value. *Anderson v. Southern Disct. Co.*, 582 F.2d 883 (4th Cir. 1978).

Security Interest in "Additions and Accessions" to Listed Chattels. — Where a promissory note was secured by certain household goods, each of which was listed and identified, and the agreement also provided for a security interest in all additions and accessions to the listed chattels, the use of the words

"additions and" did not constitute a violation of the Truth-in-Lending Act as broadly including all after-acquired furniture and household furnishings; the obvious meaning and the only proper interpretation of the phrase is that it covers only accessions, articles later acquired and physically attached to one of the listed articles. *Anderson v. Southern Dist. Co.*, 582 F.2d 883 (4th Cir. 1978).

Applied in *Lowery v. Finance America Corp.*, 32 N.C. App. 174, 231 S.E.2d 904 (1977).

Cited in *In re Dickson*, 432 F. Supp. 752 (W.D.N.C. 1977); *Mazda Motors of America, Inc. v. Southwestern Motors, Inc.*, 36 N.C. App. 1, 243 S.E.2d 793 (1978).

§ 25-9-205. Use or disposition of collateral without accounting permissible. — A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee. (1945, c. 196, s. 7; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, deleted "contract rights"

preceding "or chattel paper" near the middle of the first sentence of the section.

§ 25-9-206. Agreement not to assert defenses against assignee; modification of sales warranties where security agreement exists. — (1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the article on commercial paper (article 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

(2) When a seller retains a purchase money security interest in goods the article on sales (article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

For article on waiver of defense clauses in consumer contracts, see 48 N.C.L. Rev. 545 (1970).

Applied in *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

§ 25-9-207. Rights and duties when collateral is in secured party's possession. — (1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(2) Unless otherwise agreed, when collateral is in the secured party's possession.

(a) reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use or operation

of the collateral are chargeable to the debtor and are secured by the collateral;

(b) the risk of accidental loss or damage is on the debtor to the extent of any deficiency in any effective insurance coverage;

(c) the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;

(d) the secured party must keep the collateral identifiable but fungible collateral may be commingled;

(e) the secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it.

(3) A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections but does not lose his security interest.

(4) A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Obligation Not Applicable until Right of Possession Exercised. — The obligations of the secured party to secure and protect the collateral as required by this section are not

applicable unless and until the party has exercised his right of possession. *North Carolina Nat'l Bank v. Sharpe*, 35 N.C. 404, 241 S.E.2d 360 (1978).

Cited in *Love v. Bache & Co.*, 40 N.C. App. 617, 253 S.E.2d 351 (1979).

§ 25-9-208. Request for statement of account or list of collateral. — (1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral a debtor may similarly request the secured party to approve or correct a list of the collateral.

(2) The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good-faith statement of the obligation or a list of the collateral or both the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose. A successor in interest is not subject to this section until a request is received by him.

(3) A debtor is entitled to such a statement once every six months without charge. The secured party may require payment of a charge not exceeding ten dollars (\$10.00) for each additional statement furnished. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Cited in *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

PART 3.

RIGHTS OF THIRD PARTIES; PERFECTED AND UNPERFECTED SECURITY INTERESTS; RULES OF PRIORITY.

§ 25-9-301. Persons who take priority over unperfected security interests; rights of "lien creditor". — (1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of

(a) persons entitled to priority under G.S. 25-9-312;

(b) a person who becomes a lien creditor before the security interest is perfected;

(c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business or is a buyer of farm products in ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;

(d) in the case of accounts and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase money security interest before or within 20 days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

(4) A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien. (1945, c. 182, s. 4; c. 196, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 1979, c. 404, s. 1.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, substituted present paragraph (1)(b) for a provision which read: "a person who becomes a lien creditor without knowledge of the security interest and before it is perfected," inserted "or is a buyer of farm products in ordinary course of business" in paragraph (1)(c), deleted "contract rights" following "of accounts" near the beginning of paragraph (1)(d), substituted "after the debtor receives possession of the collateral" for "after the collateral comes into possession of the debtor" in subsection (2), and deleted the former second sentence of subsection (3), which read:

"Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest." The amendment also added subsection (4).

The 1979 amendment substituted "20" for "10" near the beginning of subsection (2).

Session Laws 1979, c. 404, s. 3, provides: "This act is effective upon ratification [April 18, 1979] but does not apply to purchase-money security interests arising out of transactions occurring before that time."

§ 25-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply. — (1) A financing statement must be filed to perfect all security interests except the following:

(a) a security interest in collateral in possession of the secured party under G.S. 25-9-305;

(b) a security interest temporarily perfected in instruments or documents without delivery under G.S. 25-9-304 or in proceeds for a 10-day period under G.S. 25-9-306;

(c) a security interest created by an assignment of a beneficial interest in a trust or a decedent's estate;

(d) a purchase money security interest in consumer goods; but compliance with G.S. 20-58 et seq. is required for a motor vehicle required to be registered; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in G.S. 25-9-313;

(e) an assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor;

(f) a security interest of a collecting bank (G.S. 25-4-208) or arising under the article on sales (see G.S. 25-9-113) or covered in subsection (3) of this section;

(g) an assignment for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder.

(2) If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(3) The filing of a financing statement otherwise required by this article is not necessary or effective to perfect a security interest in property subject to

(a) a statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this article for filing of the security interest; or

(b) the following statute of this State: G.S. 20-58 et seq. as to any personal property required to be registered pursuant to Chapter 20 of the General Statutes; but during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions of this article (part 4) apply to a security interest in that collateral created by him as debtor; or

(c) a certificate of title statute of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection (subsection (2) of G.S. 25-9-103).

(4) Compliance with a statute or treaty described in subsection (3) is equivalent to the filing of a financing statement under this article, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith except as provided in G.S. 25-9-103 on multiple-state transactions. Duration and renewal of perfection of a security interest perfected by compliance with the statute or treaty are governed by the provisions of the statute or treaty; in other respects the security interest is subject to this article.

(5) The filing provisions of this article do not apply to a security interest in property of any description or any interest therein created by a deed of trust or mortgage made by a public utility as defined in G.S. 62-3(23), or by any electric or telephone membership corporation domesticated or incorporated in North Carolina, but the deed of trust or mortgage shall be registered in the county or counties in which such deed of trust or mortgage is required by G.S. 47-20 to be registered, and all such instruments, including those creating security interests in personal property, shall be recorded in the real property records and indexed in the real property indexes.

(6) The filing provisions of this article do not apply to any security interest created in connection with the issuance of any bond, note or other evidence of indebtedness for borrowed money by this State or any political subdivision or agency thereof. (1866-7, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 3; c. 196, s. 2; 1955, c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1977, c. 103.)

Cross References. — As to application of Article 9 of the North Carolina Uniform Commercial Code to transactions under Chapter 159D, the North Carolina Industrial and Pollution Control Facilities Federal Program Financing Act, see § 159D-23. As to application of this Article to transactions under Chapter 159C, the Industrial Pollution Control Facilities Financing Act, see § 159C-28.

Editor's Note. —

The 1967 amendment, effective at midnight June 30, 1967, made changes in paragraphs (c) and (d) of subsection (1) as they stood before the 1975 amendment, inserted "or by any electric or telephone membership corporation domesticated or incorporated in North Carolina" in subsection (5) and added subsection (6). See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, rewrote paragraphs (c) and (d), deleted "or contract rights" following "outstanding accounts" in paragraph (e), and added paragraph (g), all in subsection (1), and rewrote subsections (3) and (4). The amendment also, apparently through inadvertence, omitted "corporation" following "telephone membership" in subsection (5).

The 1977 amendment, effective July 1, 1977, in subsection (5), corrected an inadvertent omission by inserting "corporation" following "telephone membership" and added the language beginning "and all such instruments, including those

creating security interests in personal property" to the end.

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971). For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

Opinions of Attorney General. — Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 40 N.C.A.G. 446 (1969).

The requirement of perfection of security interests is relevant only to third-party priority claims and not to disputes between the secured party and the debtor. *Mazda Motors of America, Inc. v. Southwestern Motors, Inc.*, 36 N.C. App. 1, 243 S.E.2d 793 (1978).

Application of Provisions as to Place for Filing Financing Statements. — Provisions of the Uniform Commercial Code with reference to the place for filing financing statements have no application to vehicles subject to registration with the Department of Motor Vehicles. *Ferguson v. Morgan*, 282 N.C. 83, 191 S.E.2d 817 (1972).

Applied in *Provident Fin. Co. v. Beneficial Fin. Co.*, 36 N.C. App. 401, 244 S.E.2d 510 (1978).

Stated in *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

§ 25-9-303. When security interest is perfected; continuity of perfection. —

(1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in G.S. 25-9-302, 25-9-304, 25-9-305 and 25-9-306. If such steps are taken before the security interest attaches, it is perfected at the time it attaches.

(2) If a security interest is originally perfected in any way permitted under this article and is subsequently perfected in some other way under this article, without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this article. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, deleted "when" following "at the time" in the second sentence of subsection (1).

For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

§ 25-9-304. Perfection of security interest in instruments, documents, and goods covered by documents; perfection by permissive filing; temporary perfection without filing or transfer of possession. — (1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in subsections (4) and (5) of this section and subsections (2) and (3) of G.S. 25-9-306 on proceeds.

(2) During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by

perfecting a security interest in the document, and any security interest in the goods otherwise perfected during such period is subject thereto.

(3) A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

(4) A security interest in instruments or negotiable documents is perfected without filing or the taking of possession for a period of 21 days from the time it attaches to the extent that it arises for new value given under a written security agreement.

(5) A security interest remains perfected for a period of 21 days without filing where a secured party having a perfected security interest in an instrument, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor

(a) makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to subsection (3) of G.S. 25-9-312; or

(b) delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.

(6) After the 21-day period in subsections (4) and (5) perfection depends upon compliance with applicable provisions of this article. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, inserted "money or" near the beginning of the second sentence in subsection (1), added "of this section and subsections (2) and (3) of G.S. 25-9-306 on proceeds" at the end of that sentence and inserted the language beginning "but priority between" at the end of paragraph (5)(a).

Applied in *Old S. Life Ins. Co. v. Bank of N.C.*, 36 N.C. App. 18, 244 S.E.2d 264 (1978).

Stated in *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

Cited in *Szabo Food Serv., Inc. v. Balentine's, Inc.*, 285 N.C. 452, 206 S.E.2d 242 (1974).

§ 25-9-305. When possession by secured party perfects security interest without filing. — A security interest in letters of credit and advices of credit (subsection (2)(a) of G.S. 25-5-116), goods, instruments, money, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this article. The security interest may be otherwise perfected as provided in this article before or after the period of possession by the secured party. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, inserted "money" near the middle of the first sentence.

Stated in *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

§ 25-9-306. "Proceeds"; secured party's rights on disposition of collateral. — (1) "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that

it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds." All other proceeds are "noncash proceeds."

(2) Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected 10 days after receipt of the proceeds by the debtor unless

(a) a filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds; or

(b) a filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds; or

(c) the security interest in the proceeds is perfected before the expiration of the 10-day period.

Except as provided in this section, a security interest in proceeds can be perfected only by the methods or under the circumstances permitted in this article for original collateral of the same type.

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds:

(a) in identifiable noncash proceeds and in separate deposit accounts containing only proceeds;

(b) in identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;

(c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a deposit account prior to the insolvency proceedings; and

(d) in all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (d) is

(i) subject to any right to setoff; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within 10 days before the institution of the insolvency proceedings less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such periods and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs (a) through (c) of this subsection (4).

(5) If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:

(a) If the goods were collateral at the time of sale, for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.

(b) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest

asserted under paragraph (a) to the extent that the transferee of the chattel paper was entitled to priority under G.S. 25-9-308.

(c) An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under paragraph (a).

(d) A security interest of an unpaid transferee asserted under paragraph (b) or (c) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods. (1945, c. 196, s. 8; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, substituted "identifiable" for "indentifiable" near the beginning of paragraph (c) of subsection (4). See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, rewrote subsection (1) and substituted "unless the disposition" for "by the debtor unless his action" in subsection (2). In subsection (3) the amendment substituted present paragraph (a) for a provision which read "a filed financing statement covering the original collateral also covers proceeds; or," added present paragraph (b) and redesignated former paragraph (b) as present paragraph (c) and added the last paragraph of the subsection. In subsection (4) the amendment added "only in the following proceeds" at the end of the introductory language, added "and in separate deposit accounts containing only proceeds" at the end of paragraph (a), substituted "neither commingled with other money nor" for "not commingled with other money or" in paragraph (b), substituted "a deposit account" for "bank account" in paragraph (c) and rewrote paragraph (d).

Continuously Perfected Security Interest. — If the security interest in the original collateral

is perfected and the filed financing statement covering the original collateral also covers proceeds, the security interest in the proceeds is a "continuously perfected security interest." *Michigan Nat'l Bank v. Flowers Mobile Homes Sales*, 26 N.C. App. 690, 217 S.E.2d 108 (1975).

There is no express limitation on right of secured party to trace proceeds subject to his security interest into a bank account of the debtor. *Michigan Nat'l Bank v. Flowers Mobile Homes Sales*, 26 N.C. App. 690, 217 S.E.2d 108 (1975).

Bank's Right to Damage Proceeds on Collateral. — The bank had the right to require defendant to turn over to the bank for application on a note the proceeds of a check issued for damages to collateral machinery rather than allowing defendants to use the proceeds to repair the machinery. *Northside Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E.2d 267, cert. denied, 289 N.C. 615, 223 S.E.2d 392 (1976).

Applied in Bank of Virginia-Central v. Taurus Constr. Co., 30 N.C. App. 220, 226 S.E.2d 685, cert. denied, 290 N.C. 659, 228 S.E.2d 450 (1976).

§ 25-9-307. Protection of buyers of goods. — (1) A buyer in ordinary course of business (subsection (9) of G.S. 25-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

(2) In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods.

(3) A buyer other than a buyer in ordinary course of business (subsection (1) of this section) takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase, or more than 45 days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the 45-day period. (1945, c. 182, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, deleted "and in the case of farm equipment having an original purchase

price not in excess of twenty-five hundred dollars (\$2,500.00) (other than fixtures, see § 25-9-313)" following "consumer goods" near

the beginning of subsection (2), deleted "or his own farming operations" following "household purposes" near the end of subsection (2) and added subsection (3).

For article "Transferring North Carolina Real Estate Part I: How the Present System

Functions," see 49 N.C.L. Rev. 413 (1971). For note on the standard of good faith for merchant buyers under subsection (1) of this section, see 51 N.C.L. Rev. 646 (1973).

§ 25-9-308. Purchase of chattel paper and instruments. — A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper or instrument

(a) which is perfected under G.S. 25-9-304 (permissive filing and temporary perfection) or under G.S. 25-9-306 (perfection as to proceeds) if he acts without knowledge that the specific paper or instrument is subject to a security interest; or

(b) which is claimed merely as proceeds of inventory subject to a security interest (G.S. 25-9-306) even though he knows that the specific paper or instrument is subject to the security interest. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, rewrote this section.

§ 25-9-309. Protection of purchasers of instruments and documents. — Nothing in this article limits the rights of a holder in due course of a negotiable instrument (G.S. 25-3-302) or a holder to whom a negotiable document of title has been duly negotiated (G.S. 25-7-501) or a bona fide purchaser of a security (G.S. 25-8-301) and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this article does not constitute notice of the security interest to such holders or purchasers. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-310. Priority of certain liens arising by operation of law. — When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

§ 25-9-311. Alienability of debtor's rights; judicial process. — The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-312. Priorities among conflicting security interests in the same collateral. — (1) The rules of priority stated in other sections of this part and in the following sections shall govern when applicable: G.S. 25-4-208 with respect to the security interests of collecting banks in items being collected, accompanying documents and proceeds; G.S. 25-9-103 on security interests related to other jurisdictions; G.S. 25-9-114 on consignments.

(2) A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

(3) A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if

(a) the purchase money security interest is perfected at the time the debtor receives possession of the inventory; and

(b) the purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory (i) before the date of the filing made by the purchase money secured party, or (ii) before the beginning of the 21-day period where the purchase money security interest is temporarily perfected without filing or possession (subsection (5) of G.S. 25-9-304); and

(c) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and

(d) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

(4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within 20 days thereafter.

(5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:

(a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.

(b) So long as conflicting security interests are unperfected, the first to attach has priority.

(6) For the purposes of subsection (5) a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.

(7) If future advances are made while a security interest is perfected by filing or the taking of possession, the security interest has the same priority for the purposes of subsection (5) with respect to the future advances as it does with respect to the first advance. If a commitment is made before or while the security

interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases a perfected security interest has priority from the date the advance is made. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 196, s. 4; 1955, c. 816; 1957, c. 999; 1965, c. 700, s. 1; 1967, c. 24, s. 13; 1975, c. 862, s. 7; 1979, c. 404, s. 2.)

Editor's Note. —

The 1967 amendment, originally effective Oct. 1, 1967, corrected an error by substituting "or" for "of" in paragraph (b) of subsection (3) as it stood before the 1975 amendment. Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

The 1975 amendment, effective July 1, 1976, rewrote subsections (1) and (3), inserted "or its proceeds" near the middle of subsection (4), substituted "according to the following rules" for "as follows" at the end of the introductory language in subsection (5) and rewrote the remainder of that subsection, rewrote subsection (6) and added subsection (7).

The 1979 amendment substituted "20" for "10" near the end of subsection (4).

Session Laws 1979, c. 404, s. 3, provides: "This act is effective upon ratification [April 18, 1979]

but does not apply to purchase-money security interests arising out of transactions occurring before that time."

Landlord Perfecting Security Interest by Taking Possession Has Priority over Selling Company. — In an action to determine the right of possession to a piece of property as between a landlord under a lease agreement and a company who sold the property under a conditional sales contract, neither party having filed a financing statement, the landlord, who perfected its security interest under the lease by taking possession of the property pursuant to § 25-9-503, has priority over the selling company. *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

Applied in *Provident Fin. Co. v. Beneficial Fin. Co.*, 36 N.C. App. 401, 244 S.E.2d 510 (1978).

§ 25-9-313. Priority of security interests in fixtures. — (1) In this section and in the provisions of part 4 of this article referring to fixture filing, unless the context otherwise requires

(a) goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law;

(b) a "fixture filing" is the filing of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of G.S. 25-9-402 or of a mortgage or deed of trust conforming to the requirements of subsection (6) of G.S. 25-9-402;

(c) a mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.

(2) A security interest under this article may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this article in ordinary building materials incorporated into an improvement on land.

(3) This article does not prevent creation of an encumbrance upon fixtures pursuant to real estate law.

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within 10 days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this article; or

(d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article.

(5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or

(b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

(6) Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

(7) In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.

(8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, deleted the former last paragraph of subsection (4), relating to the perfection of a security interest against real estate. See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, rewrote this section.

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

§ 25-9-314. Accessions. — (1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in subsection (3) and subject to G.S. 25-9-315(1).

(2) A security interest which attaches to goods after they become part of a whole is valid against all persons subsequently acquiring interests in the whole except as stated in subsection (3) but is invalid against any person with an interest in the whole at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as part of the whole.

(3) The security interests described in subsections (1) and (2) do not take priority over

(a) a subsequent purchaser for value of any interest in the whole; or

(b) a creditor with a lien on the whole subsequently obtained by judicial proceedings; or

(c) a creditor with a prior perfected security interest in the whole to the extent that he makes subsequent advances
if the subsequent purchase is made, the lien by judicial proceedings obtained or the subsequent advance under the prior perfected security interest is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the whole at a foreclosure sale other than the holder of a perfected security interest purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(4) When under subsections (1) or (2) and (3) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may on default subject to the provisions of part 5 remove his collateral from the whole but he must reimburse any encumbrancer or owner of the whole who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-315. Priority when goods are commingled or processed. — (1) If a security interest in goods was perfected and subsequently the goods or a part thereof have become part of a product or mass, the security interest continues in the product or mass if

(a) the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass; or

(b) a financing statement covering the original goods also covers the product into which the goods have been manufactured, processed or assembled.

In a case to which paragraph (b) applies, no separate security interest in that part of the original goods which has been manufactured, processed or assembled into the product may be claimed under G.S. 25-9-314.

(2) When under subsection (1) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-316. Priority subject to subordination. — Nothing in this article prevents subordination by agreement by any person entitled to priority. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-317. Secured party not obligated on contract of debtor. — The mere existence of a security interest or authority given to the debtor to dispose of or use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or omissions. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Quoted in *Edwards v. Northwestern Bank*, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

§ 25-9-318. Defenses against assignee; modification of contract after notification of assignment; term prohibiting assignment ineffective; identification and proof of assignment. — (1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in G.S. 25-9-206 the rights of an assignee are subject to

(a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

(2) So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

(3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

(4) A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest. (1945, c. 196, s. 6; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, inserted "or a part thereof" near the beginning of subsection (2), substituted "contract has not been fully earned by performance" for "contract right has not already become an account" near the beginning of the first sentence of subsection (2), substituted "that the amount due or to become

due" for "that the account" in the first sentence of subsection (3) and substituted present subsection (4) for a provision which read: "A term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract right to which they are parties is ineffective."

PART 4.

FILING.

§ 25-9-401. Place of filing; erroneous filing; removal of collateral. — (1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the register of deeds in the county of the debtor's residence or if the debtor is not a resident of this State then in the office of the register of deeds in the county where the goods are kept, and in addition when the collateral is crops growing or to be grown in the office of the register of deeds in the county where the land is located;

(b) when the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or when the financing statement is filed as a fixture filing (G.S. 25-9-313) and the collateral is goods which are or are to become fixtures, then in the office of the register of deeds in the county where the land is located;

(c) in all other cases, in the office of the Secretary of State and in addition, if the debtor has a place of business in only one county of this State, also in the office of the register of deeds of such county, or, if the debtor has no place of business in this State, but resides in the State, also in the office of the register of deeds of the county in which he resides.

(2) A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

(3) A filing which is made in the proper place in this State continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.

(4) The rules stated in G.S. 25-9-103 determine whether filing is necessary in this State.

(5) For the purposes of this section, the residence of an organization is its place of business if it has one or its chief executive office if it has more than one place of business. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 3; c. 196, s. 2; 1955, c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. —

The 1975 amendment, effective July 1, 1976, deleted "contract rights" preceding "or general intangibles" near the beginning of paragraph (1)(a), inserted "growing or to be grown" and deleted "on which the crops are growing or to be grown" following "the land" near the end of that paragraph, rewrote paragraph (1)(b), deleted "If collateral is brought into this State from another jurisdiction" at the beginning of subsection (4) and added subsection (5).

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977). For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

Opinions of Attorney General. — Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 40 N.C.A.G. 446 (1969).

The requirement of perfection of security interests is relevant only to third-party priority claims and not to disputes between the secured party and the debtor. *Mazda Motors of America, Inc. v. Southwestern Motors, Inc.*, 36 N.C. App. 1, 243 S.E.2d 793 (1978).

Dual Filing Required for Farm Goods. — In order to perfect a security interest in farm products, crops, and equipment used in farming operations from subsequently acquired rights of third parties, the secured party must file a financing statement in the county of the debtor's residence and also in the county where the land on which the crops are growing, or are to be grown, is located. *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971).

Cited in *Szabo Food Serv., Inc. v. Balentine's, Inc.*, 285 N.C. 452, 206 S.E.2d 242 (1974); *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976).

§ 25-9-402. Formal requisites of financing statement; amendments; mortgage as financing statement. — (1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops

growing or to be grown, the statement must indicate that the collateral is or includes crops and must contain a description of the real estate concerned. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or when the financing statement is filed as a fixture filing (G.S. 25-9-313) and the collateral is goods which are or are to become fixtures, the statement must also comply with subsection (5). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this State.

(2) A financing statement which otherwise complies with subsection (1) is sufficient when it is signed by the secured party instead of the debtor if it is filed to perfect a security interest in

(a) collateral already subject to a security interest in another jurisdiction when it is brought into this State, or when the debtor's location is changed to this State. Such a financing statement must state that the collateral was brought into this State or that the debtor's location was changed to this State under such circumstances; or

(b) proceeds under G.S. 25-9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral; or

(c) collateral as to which the filing has lapsed; or

(d) collateral acquired after a change of name, identity or corporate structure of the debtor (subsection (7)).

(3) A form substantially as follows is sufficient to comply with subsection (1):

Name of debtor (or assignor)
Address
Name of secured party (or assignee)
Address

1. This financing statement covers the following types (or items) of property: (Describe)

2. (If collateral is crops) The above described crops are growing or are to be grown on:

(Describe Real Estate)

3. (If applicable) The above goods are to become fixtures on *

* Where appropriate substitute either 'The above timber is standing on . . .'
or 'The above minerals or the like (including oil and gas) or accounts will be financed at the wellhead or minehead of the well or mine located on . . .'

(Describe Real Estate)

(If the debtor does not have an interest of record)

The name of a record owner is

4. (If products of collateral are claimed) Products of the collateral are also covered.

(use	}	
whichever		Signature of Debtor (or Assignor)
is		
applicable)	}	Signature of Secured Party (or Assignee)

(4) A financing statement may be amended by filing a writing signed by both the debtor and the secured party. An amendment does not extend the period of effectiveness of a financing statement. If any amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment. In this article, unless the context otherwise requires, the term "financing statement" means the original financing statement and any amendments.

(5) A financing statement covering timber to be cut or covering minerals of the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or a financing statement filed as a fixture filing (G.S. 25-9-313) must contain a description of the real estate. If the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner. A financing statement filed as a fixture filing (G.S. 25-9-313) must bear the statement "Collateral is or includes fixtures" or its substantial equivalent or have checked the appropriate box identifying "FIXTURES." If a copy of a security agreement is filed as a financing statement, as authorized by G.S. 25-9-402, to perfect security interests in fixtures, the secured party or other filer shall stamp or print conspicuously on the face of the first page of such copy the legend "Collateral is or includes fixtures."

(6) A mortgage or deed of trust is effective as a financing statement filed as a fixture filing from the date of its recording if

(a) the goods are described in the mortgage or deed of trust by item or type; and

(b) the goods are or are to become fixtures related to the real estate described in the mortgage or deed of trust; and

(c) the mortgage or deed of trust complies with the requirements for a financing statement in this section; and

(d) the mortgage or deed of trust is duly recorded in the real estate records. Such a mortgage or deed of trust shall not be indexed or filed in the Uniform Commercial Code files. No fee with reference to such a mortgage or deed of trust is required other than the regular recording and satisfaction fees with respect to the mortgage or deed of trust.

(7) A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners. Where the debtor so changes his name or in the case of an organization its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time. A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.

(8) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.

(9) The Secretary of State shall have the authority to promulgate, issue and prescribe such financing statement forms and such other forms as he deems necessary to be used as standard forms for any filing contemplated by any section of this article. (1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s. 2055; 1907, c. 843; 1909, c. 532; P. L. 1913, c. 49; C. S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; 1945, c. 182, s. 2; c. 196, s. 2; 1951, c. 926, s. 1; 1955, c. 386, s. 1; 1957, c. 564; 1961, c. 574; 1965, c. 700, s. 1; 1969, c. 1115, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1969 amendment, effective at midnight June 30, 1969, deleted references to "record lessee" and made other changes in subsections (1) and (3) as they stood before the 1975 amendment and added present subsection (9).

The 1975 amendment, effective July 1, 1976, rewrote this section.

Lien May Not Be Circumvented by Use of Technical Defects in Record. — A trustee in

bankruptcy shall not be allowed to circumvent a lien by use of technical defects in the record, especially where there is no showing that any creditor was misled to any extent. *Stafford v. Admiral Credit Corp.*, 280 F. Supp. 818 (M.D.N.C. 1968), decided under former § 45-58.

Filing was satisfactory under the former Uniform Trust Receipts Act where the defects in the filing were not such as to mislead a searcher of the record making reasonable inquiry.

Stafford v. Admiral Credit Corp., 280 F. Supp. 818 (M.D.N.C. 1968), decided under former § 45-58.

This section adopts a system of notice filing. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Sample Form in Subsection (3). — Subsection (3) of this section sets out a form which, if substantially followed, will comply with the requirements for a financing statement. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

The Code distinguishes between a security agreement and a financing statement. The security agreement is a writing which (1) creates or provides for a security interest; (2) contains a description of the collateral, plus a description of the land involved when the security interest covers crops or oil, gas or minerals to be extracted or timber to be cut, and (3) is signed by the debtor. The financing statement is a writing which (1) contains the signature and addresses of both the debtor and creditor and (2) a description of the collateral plus a description of the land involved when the financing statement covers crops growing or to be grown or goods which are or are to become fixtures. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

A financing statement does not ordinarily create a security interest; it merely gives notice that one is or may be claimed. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

A financing statement which does no more than meet the requirements of this section will not create a security interest in the debtor's property. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

A financing statement may double as a security agreement if it contains appropriate language which grants a security interest. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Although the Code contemplates the execution of two separate writings, it does not prohibit the combination of a security agreement and financing statement. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Where the financing statement contains language clearly manifesting the debtor's intent to grant, create, and provide for a security interest, bears his signature, describes the obligation secured, the collateral subject to the security interest, and the land involved, the financing statement meets the requirements of an enforceable security agreement and serves the double purpose. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

If the financing statement contains the elements for a security agreement in addition to

those for the financing statement, it would serve as the security agreement. The additional elements would be (1) something to indicate agreement; (2) a statement of the obligation or obligations secured; and, (3) provision for or creation of the security interest. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Although the financing statement need only be a skeletal statement that the parties intend to engage in future transactions, which may never be consummated, subsection (1) of this section specifically provides that "a copy of the security agreement is sufficient as a financing statement" if it contains the required information and is signed by both parties. There is no sound reason why a financing statement may not also serve as a security agreement if it meets the requirements of § 25-9-105(1)(h) and § 25-9-203(1)(b). Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Financing Statement Sufficient to Provide Security Interest. — Where the financing statement declared that it "covers the following type of collateral: (all crops now growing or to be planted on 5 specified farms) same securing note for advance money to produce crops for the year 1969," and the note contained the statement that it "is secured by Uniform Commercial Code financing statement of North Carolina," the financing statement and the note manifested defendant's intent to create in plaintiff a security interest in the described collateral and he did, in fact, provide for such interest when he stated that the crops described therein secured the note for money advanced to produce these crops. Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971).

Application of Definition of "Signed" in § 25-1-201 to Financing Statements. — In cases dealing with the debtor's signature on financing statements, the courts should apply the liberal definition of "signed" in § 25-1-201(39) with caution. Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 244 S.E.2d 510, cert. denied, 295 N.C. 549, 248 S.E.2d 728 (1978).

Typed Name on Financing Statement Not Signature. — Where there is nothing whatsoever on the face of a financing statement to suggest that the debtor "adopted" the typed name as his signature, the debtor has not signed the financing statement as required by this section, and that financing statement is ineffective. Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 244 S.E.2d 510, cert. denied, 295 N.C. 549, 248 S.E.2d 728 (1978).

§ 25-9-403. What constitutes filing; duration of filing; effect of lapsed filing; duties of filing officer. — (1) Presentation for filing of a financing

statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this article.

(2) Except as provided in subsection (6), or in article 12 of chapter 44, a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the five-year period, whichever occurs later. Upon lapse the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.

(3) A continuation statement may be filed by the secured party within six months prior to the expiration of the five-year period specified in subsection (2). Any such continuation statement must be signed by the secured party, identify the original statement by file number and state that the original statement is still effective. A continuation statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of G.S. 25-9-405, including payment of the required fee. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection (2) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it immediately if he has retained a microfilm or other photographic record, or in other cases after one year after the lapse. The filing officer shall so arrange matters by physical annexation of financing statements to continuation statements or other related filings, or by other means, that if he physically destroys the financing statements of a period more than five years past, those which have been continued by a continuation statement or which are still effective under subsection (6) shall be retained. Any continuation statement which is not filed in accordance with the requirements set forth herein and during the stated time periods set forth above shall be invalid.

(4) A filing officer shall mark each statement with a file number and with the date and hour of filing and shall hold the statement or a microfilm or other photographic copy thereof for public inspection. In addition the filing officer shall index the statement according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement.

(5) The uniform fee for filing and indexing and for stamping a copy furnished by the secured party to show the date and place of filing for an original financing statement or for a continuation statement shall be four dollars (\$4.00) for an approved statutory form statement as prescribed in G.S. 25-9-402 when printed on a standard-size form approved by the Secretary of State, and for all other statements, a five dollar (\$5.00) minimum charge for up to and including three pages and one dollar (\$1.00) per page for all over three pages. There shall be an additional fee of two dollars (\$2.00) for each financing statement and continuation statement subject to subsection (5) of G.S. 25-9-402.

(6) A real estate mortgage which is effective as a fixture filing under subsection (6) of G.S. 25-9-402 remains effective as a fixture filing until the mortgage is redeemed or satisfied of record or its effectiveness otherwise terminates as to the real estate.

(7) When a financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or is filed as a fixture filing, the filing officer, in addition to complying with subsection (4) of this section, shall:

(a) index the statements in the Uniform Commercial Code index to financing statements so as to reflect the name of any record owner given in the statement. When the debtor is not the record owner, the filing officer shall enter the name of the record owner in the place designated for entry of the name of the debtor and shall stamp or print conspicuously beneath the surname of the record owner the legend "RECORD OWNER" and shall note therein the file number of the financing statement. When the debtor is also the record owner, the filing officer shall make one index entry in the name of the debtor and shall stamp or print conspicuously beneath his surname the legend, "RECORD OWNER." The filing officer shall also:

(b) index the statements in the real estate indexes under the names of the debtor and any owner of record shown on the financing statement in the same fashion as if they were the mortgagors in a mortgage of the real estate described, and, to the extent that the law of this State provides for indexing of mortgages under the name of the mortgagee, under the name of the secured party as if he were the mortgagee thereunder, or where indexing is by description in the same fashion as if the financing statement were a mortgage of the real estate described. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, ss. 2, 4; c. 196, s. 2; 1955, c. 386, ss. 1, 2; c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115, s. 1; 1971, c. 1170; 1973, c. 1316, s. 1; 1975, c. 862, s. 7; 1977, cc. 156, 295.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, deleted the former third sentence of subsection (4), relating to the filing or recording of an instrument covering fixtures. See Editor's note to § 25-1-201.

The 1969 amendment, effective at midnight June 30, 1969, added former subdivisions (a), (b), (c) and (d) of subsection (4), which were eliminated by the 1975 amendment.

The 1971 amendment deleted all references to "crops" in subsection (4).

The 1973 amendment, effective July 1, 1974, substituted "four dollars (\$4.00)" for "two dollars (\$2.00)" and "five dollars (\$5.00)" for "three dollars (\$3.00)" in subsection (5).

The 1975 amendment, effective July 1, 1976, rewrote this section.

The first 1977 amendment, effective July 1, 1977, in subsection (7), inserted "covers timber to be cut or" near the beginning of the introductory language and inserted a colon at the end of the introductory language.

The second 1977 amendment, effective July 1, 1977, added the last sentence of subsection (3).

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

A continuation statement must be filed within the six-month period prior to the last date the original financing statement would have been effective. Opinion of Attorney General to Eunice Avers, Register of Deeds, Forsythe County, 46 N.C.A.G. 209 (1977).

Continuation from Last Effective Date of Original Statement. — The financing statement is continued for five years from the last date the original statement would have been effective if no continuation had been filed. Opinion of Attorney General to Eunice Avers, Register of Deeds, Forsythe County, 46 N.C.A.G. 209 (1977).

Applied in *Ferguson v. Morgan*, 282 N.C. 83, 191 S.E.2d 817 (1972); *Provident Fin. Co. v. Beneficial Fin. Co.*, 36 N.C. App. 401, 244 S.E.2d 510 (1978).

Cited in *Mosley v. National Fin. Co.*, 36 N.C. App. 109, 243 S.E.2d 145 (1978).

§ 25-9-404. Termination statement. — (1) If a financing statement covering consumer goods is filed on or after July 1, 1976, then within one month or within 10 days following written demand by the debtor after there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must file with each filing officer with whom the financing statement was filed a termination statement to the effect

that he no longer claims a security interest under the financing statement, which shall be identified by file number. In other cases whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must on written demand by the debtor send the debtor, for each filing officer with whom the financing statement was filed, a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of G.S. 25-9-405, including payment of the required fee. If the affected secured party fails to file such a termination statement as required by this subsection, or to send such a termination statement within 10 days after proper demand therefor, he shall be liable to the debtor for one hundred dollars (\$100.00), and in addition for any loss caused to the debtor by such failure.

(2) On presentation to the filing officer of such a termination statement he must note it in the Uniform Commercial Code index and also, if the financing statement to be terminated is subject to subsection (5) of G.S. 25-9-402, in the real estate index. The termination statement shall then remain in the file for such period of time as the financing statement or a continuation statement would be effective under the five-year life provided in G.S. 25-9-403, and then may be destroyed. The filing officer shall remove from the files, mark "terminated" and send or deliver to the secured party the financing statement and any continuation statement, statement of assignment or statement of release pertaining thereto. If the filing officer has received the termination statement in duplicate, he shall return one copy of the termination statement to the secured party stamped to show the time of receipt thereof.

(3) There shall be no fee charged for termination statements. (1945, c. 182, s. 5; c. 196, s. 3; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115, s. 1; 1973, c. 1316, ss. 2, 3; 1975, c. 862, s. 7.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, deleted former subsection (4), relating to termination of a financing statement or security agreement by presenting the original statement or agreement or an executed duplicate marked paid and satisfied. See Editor's note to § 25-1-201.

The 1969 amendment, effective at midnight June 30, 1969, made changes in fee provisions formerly in subsection (1).

The 1973 amendment, effective July 1, 1974, increased fees formerly required in subsection (1) and repealed former subsection (3), which provided for a uniform fee for filing and indexing a termination statement.

The 1975 amendment, effective July 1, 1976, rewrote this section.

Applied in *Provident Fin. Co. v. Beneficial Fin. Co.*, 36 N.C. App. 401, 244 S.E.2d 510 (1978).

§ 25-9-405. Assignment of security interest; duties of filing officer; fees. —

(1) A financing statement may disclose an assignment of a security interest in the collateral described in the financing statement by indication in the financing statement of the name and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. On presentation to the filing officer of such a financing statement the filing officer shall mark the same as provided in G.S. 25-9-403(4). The uniform fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be four dollars (\$4.00) when submitted on a standard-size form approved by the Secretary of State, and for all other statements a five-dollar (\$5.00) minimum charge for up to and including three pages and one dollar (\$1.00) per page for all over three pages.

(2) A secured party may assign of record all or part of his rights under a financing statement by the filing in the place where the original financing statement was filed of a separate written statement of assignment signed by the

secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the Uniform Commercial Code index of the financing statement, and in the case of a fixture filing, or a filing covering timber to be cut, or covering minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, he shall index in the real estate index the assignment under the name of the assignor as grantor and, to the extent that the law of this State provides for indexing the assignment of a mortgage under the name of the assignee, he shall index the assignment of the financing statement under the name of the assignee. The uniform fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be three dollars (\$3.00) when submitted on a standard-size form approved by the Secretary of State, and for all other statements a four-dollar (\$4.00) minimum charge for up to and including three pages and one dollar (\$1.00) per page for all over three pages. When the assignment is of a financing statement subject to subsection (5) of G.S. 25-9-402, there shall be an additional fee of two dollars (\$2.00). Notwithstanding the provisions of this subsection, an assignment of record of a security interest in a fixture contained in a mortgage effective as a fixture filing (subsection (6) of G.S. 25-9-402) may be made only by an assignment of the mortgage in the manner provided by the law of the State other than this Chapter.

(3) After the disclosure or filing of an assignment under this section, the assignee is the secured party of record. (1965, c. 700, s. 1; 1967, c. 24, s. 23; 1969, c. 1115, s. 1; 1973, c. 1316, ss. 4, 5; 1975, c. 862, s. 7.)

Editor's Note. — The 1967 amendment, originally effective Oct. 1, 1967, made a change in the last sentence of subsection (2) as it stood before the 1969 amendment. Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

The 1969 amendment, effective at midnight June 30, 1969, rewrote the former last sentences of subsections (1) and (2).

The 1973 amendment, effective July 1, 1974, increased the fees.

The 1975 amendment, effective July 1, 1976, inserted "financing" preceding "statement" in two places in the first sentence of subsection (1) and deleted the former second sentence of subsection (1), which read: "Either the original secured party or the assignee may sign this statement as the secured party." In subsection (2) the amendment inserted "in the place where the original financing statement was filed" near the beginning of the first sentence, rewrote the fourth sentence and added the last sentence.

§ 25-9-406. Release of collateral; duties of filing officer; fees. — A secured party of record may, by his signed statement, release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. A statement of release signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of G.S. 25-9-405, including payment of the required fee. Upon presentation of such a statement of release to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a statement of release shall be three dollars (\$3.00) when submitted on a standard-size form approved by the Secretary of State, and for all other statements a four-dollar (\$4.00) minimum charge for up to and including three pages and one dollar (\$1.00) per

page for all over three pages. There shall be an additional fee of two dollars (\$2.00) when the statement of release affects a financing statement subject to subsection (5) of G.S. 25-9-402. (1965, c. 700, s. 1; 1967, c. 24, s. 25; 1969, c. 1115, s. 1; 1973, c. 1316, s. 6; 1975, c. 862, s. 7.)

Editor's Note. — The 1967 amendment, originally effective Oct. 1, 1967, inserted "per page" near the end of the present fifth sentence. Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

The 1969 amendment, effective at midnight June 30, 1969, rewrote the present fifth sentence.

The 1973 amendment, effective July 1, 1974, substituted "three dollars (\$3.00)" for "two

dollars (\$2.00)" and "four dollars (\$4.00)" for "three dollars (\$3.00)" in the present fifth sentence of the section.

The 1975 amendment, effective July 1, 1976, added the third and the last sentences of the section and inserted "of release" following "statement" near the beginning of the fourth sentence.

§ 25-9-407. Information from filing officer. — (1) If the person filing any financing statement, termination statement, statement of assignment or statement of release furnishes the filing officer a copy thereof, the filing officer shall upon request note upon the copy the file number and date and hour of the filing of the original and deliver or send the copy to such person.

(2) Upon request of any person, the filing officer shall issue his certificate for which he shall not be liable showing whether there is on file, on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein. The uniform fee for such a certificate shall be three dollars (\$3.00) plus one dollar (\$1.00) for each financing statement and for each statement of assignment reported therein. Upon request the filing officer shall furnish a copy of any filed financing statement or statement of assignment for a uniform fee of one dollar (\$1.00) per page. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1973, c. 1316, s. 7; 1975, c. 862, s. 7.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, added the first and second sentences of subsection (2). See Editor's note to § 25-1-201.

The 1973 amendment, effective July 1, 1974, increased the uniform fee for a certificate from

\$2.00 to \$3.00 in the second sentence of subsection (2).

The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-408. Financing statements covering consigned or leased goods. — A consignor or lessor of goods may file a financing statement using the terms "consignor," "consignee," "lessor," "lessee" or the like instead of the terms specified in G.S. 25-9-402. The provisions of this part shall apply as appropriate to such a financing statement but its filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security (G.S. 25-1-201(37)). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or leased goods is perfected by such filing. (1975, c. 862, s. 7.)

Editor's Note. —

Session Laws 1975, c. 862, s. 10, makes the act effective July 1, 1976. The former § 25-9-408,

catchlined "Recording of financing statement and security agreement in lieu of filing," was repealed by Session Laws 1967, c. 562, s. 1.

PART 5.

DEFAULT.

§ 25-9-501. Default; procedure when security agreement covers both real and personal property. — (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in G.S. 25-9-207. The rights and remedies referred to in this subsection are cumulative.

(2) After default, the debtor has the rights and remedies provided in this part, those provided in the security agreement and those provided in G.S. 25-9-207.

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subsection (3) of G.S. 25-9-504 and 25-9-505) and with respect to redemption of collateral (G.S. 25-9-506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:

(a) subsection (2) of G.S. 25-9-502 and subsection (2) of G.S. 25-9-504 insofar as they require accounting for surplus proceeds of collateral;

(b) subsection (3) of G.S. 25-9-504 and subsection (1) of G.S. 25-9-505 which deal with disposition of collateral;

(c) subsection (2) of G.S. 25-9-505 which deals with acceptance of collateral as discharge of obligation;

(d) G.S. 25-9-506 which deals with redemption of collateral; and

(e) subsection (1) of G.S. 25-9-507 which deals with the secured party's liability for failure to comply with this part.

(4) If the security agreement covers both real and personal property, the secured party may proceed under this part as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this part do not apply.

(5) When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article. (1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; Code, s. 1800; 1893, c. 9; Rev., s. 2054; C. S., s. 2488; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, substituted "(subsection (3) of G.S. 25-9-504 and 25-9-505)" for "(subsection (1) of § 25-9-505)" near the middle of subsection (3).

No Obligation to Take Possession upon Demand of Debtor. — The right of the secured

party to take possession of the collateral does not impose an obligation to take possession upon demand of the debtor. *North Carolina Nat'l Bank v. Sharpe*, 35 N.C. App. 404, 241 S.E.2d 360 (1978).

Applied in *Graham v. Northwestern Bank*, 16 N.C. App. 287, 192 S.E.2d 109 (1972).

§ 25-9-502. Collection rights of secured party. — (1) When so agreed and in any event on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which he is entitled under G.S. 25-9-306.

(2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, deleted "contract rights"

following "sale of accounts" in the last sentence of subsection (2).

§ 25-9-503. Secured party's right to take possession after default. — Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under G.S. 25-9-504. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Landlord Perfecting Security Interest by Taking Possession Has Priority over Selling Company. — In an action to determine the right of possession to a piece of property as between a landlord under a lease agreement and a company who sold the property under a conditional sales contract, neither party having filed a financing statement, the landlord, who perfected its security interest under the lease by taking possession of the property pursuant to § 25-9-503, has priority over the selling company. *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970).

No Obligation to Take Possession upon Demand of Debtor. — The right of the secured party to take possession of the collateral does not impose an obligation to take possession upon demand of the debtor. *North Carolina Nat'l Bank v. Sharpe*, 35 N.C. App. 404, 241 S.E.2d 360 (1978).

Right to Take Possession of Collateral Otherwise Exempt from Execution. — The legislature has seen fit to surround the family home with certain protection against the demands of urgent creditors to put it beyond the

reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid. It has not seen fit to prevent a debtor from "selling" or otherwise transferring an interest in that property to another, thereby giving the other priority of right to possession of the collateral. The constitutional exemption operates against general creditors so as to allow the debtor to retain his most valued \$500.00 of property in the face of their executions. It does not operate so as to hinder secured creditors from realizing on the terms of their bargain. *Montford v. Grohman*, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

In the cases of foreclosure of mortgages or of taking possession of collateral after default, no right to possession of property otherwise exempt remains in the debtor who has voluntarily bargained it away. *Montford v. Grohman*, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Debtor divested herself of her right to possession of personal property which might otherwise have been exempt by the terms of her consumer loan contract with her creditor whereby the creditor obtained a security interest in all of her personal property, including her

household furnishings. When the debtor defaulted, the creditor had an immediate right to possess all articles in which she had given a security interest. However, this right must be distinguished from any interest which a creditor might seek under an executory waiver of the

right to exemption. It has long been held that a debtor cannot be bound by any agreement to waive his exemption in case of levy upon her property. *Montford v. Grohman*, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

§ 25-9-504. Secured party's right to dispose of collateral after default; effect of disposition. — (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the article on sales (article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, endorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, inserted "or lease" and "leasing" near the beginning of subdivision (1)(a), deleted "contract rights" preceding "chattel paper" in subsection (2) and rewrote the former third sentence of subsection (3) as the present third, fourth and fifth sentences.

For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

Public or Private Sale. — The Uniform Commercial Code specifically authorizes the disposition of collateral by either public or private proceedings. *Associates Financial Servs. Corp. v. Welborn*, 269 N.C. 563, 153 S.E.2d 7 (1967).

The statement in the North Carolina Comment to the Uniform Commercial Code appended to this section that "under prior law . . . a public sale had to be held," is not correct, and the authorities cited do not sustain this assertion. *Associates Financial Servs. Corp. v. Welborn*, 269 N.C. 563, 153 S.E.2d 7 (1967).

A provision in a conditional sales contract for private sale of the chattel after default and repossession, is not contrary to statute or public policy of this State, and is valid. *Associates Financial Servs. Corp. v. Welborn*, 269 N.C. 563, 153 S.E.2d 7 (1967).

A stipulation in a chattel mortgage or conditional sales agreement authorizing the creditor to sell the personal property described therein at private sale violated no statute or public policy of this State. *Appliance Buyers Credit Corp. v. Mason*, 269 N.C. 567, 153 S.E.2d 3 (1967) (decided under § 45-21.38 prior to the 1967 amendment thereto).

An authorization in a chattel mortgage or conditional sales agreement permitting a private sale of the personal property, does not relieve the mortgagee, in taking possession of and selling the property, from the duty of acting in the utmost good faith. *Appliance Buyers Credit Corp. v. Mason*, 269 N.C. 567, 153 S.E.2d 3 (1967) (decided under § 45-21.38 prior to the 1967 amendment thereto).

Conclusive Presumption of Commercial Reasonableness Created by Compliance with Part 6. — If the secured creditor disposes of the collateral in a manner in substantial compliance with Part 6 of this Article, a conclusive presumption of commercial reasonableness is created. *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

But a public sale may be commercially reasonable even though it does not substantially comply with Part 6 of this Article. *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Absent the establishment of the conclusive presumption of commercial reasonableness, under Part 6 of this Article, a question of fact remains as to whether the sale was conducted in a commercially reasonable manner under subsection (3) of this section. *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Section 25-9-507 offers guidance as to what constitutes a "commercially reasonable" disposition of the collateral under § 25-9-504. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

In order to recover a deficiency judgment under a conditional sales contract, plaintiff had to allege and prove facts showing (1) that defendant executed and delivered to him or his assignor the contract upon which he sued; (2) that defendant was in default under the terms of the contract; (3) lawful repossession and sale of the property or facts establishing the impossibility of such repossession and sale; (4) the application of the proceeds of the sale; and (5) the amount of the deficiency. *Associates Financial Servs. Corp. v. Welborn*, 269 N.C. 563, 153 S.E.2d 7 (1967) (construing § 45-21.38 prior to the 1967 amendment thereto).

A creditor, when suing for a deficiency, has the burden of proving that the disposition of the collateral was conducted in a commercially reasonable manner. *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Creditor Must Prove That Disposition of Collateral was Commercially Reasonable. — In order to recover the deficiency, the creditor must first prove that the disposition of the collateral was commercially reasonable. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

"Price" is one of the "terms" of the sale within the meaning of subsection (3) of this section. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

All Elements of Sale Must Be Considered Together. — There may be cases in which the price paid for the collateral will be commercially reasonable even though a higher price could have been obtained at a different time or in a

different market. Nor is a price which is slightly inadequate necessarily commercially unreasonable. The trier of fact must consider all the elements of the sale together. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

Effect of Grossly Inadequate Price. — When the debtor offers independent evidence of a gross inadequacy of price, in North Carolina, that sufficiently raises the issue of the commercial reasonableness of the sale to take the case to the jury. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

Price Actually Received as Evidence of Value of Collateral. — Once the secured party makes a prima facie showing that the sale was otherwise "commercially reasonable," then the price he actually receives for the collateral must be accepted as competent evidence of the value of the collateral and, therefore, as competent evidence that the price was "commercially reasonable." Such evidence is sufficient to withstand defendants' motion for a directed

verdict and to take the case to the jury. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

Burden of Proving Notice to Debtor. — In actions by a creditor to obtain a deficiency judgment, the burden of proving that notice was properly sent by the creditor to the debtor rests with the creditor. *North Carolina Nat'l Bank v. Burnette*, 38 N.C. App. 120, 247 S.E.2d 648 (1978), cert. granted, 296 N.C. 410, S.E.2d (1979).

Applied in *First Union Nat'l Bank v. Tectamar, Inc.*, 33 N.C. App. 604, 235 S.E.2d 894 (1977).

Quoted in *Graham v. Northwestern Bank*, 16 N.C. App. 287, 192 S.E.2d 109 (1972).

Stated in *Lexington State Bank v. Suburban Printing Co.*, 7 N.C. App. 359, 172 S.E.2d 274 (1970).

Cited in *North Carolina Nat'l Bank v. Holshouser*, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

§ 25-9-504.1. Payment of surplus to clerk. — (1) Any surplus remaining after the application of the proceeds of the sale or other disposition as set out in G.S. 25-9-504(1) and (2) shall be paid to the person or persons entitled thereto, if the party who made the sale knows who is entitled thereto. Otherwise, the surplus shall be paid to the clerk of the superior court of the county where the sale or other disposition was held, if the disposition took place in this State. If the sale or other disposition took place outside this State, then the secured party or person making the sale or other disposition shall pay said surplus money to the clerk of superior court of any county in this State in which the secured party or other party conducting the said sale or disposition does business. Said payment discharges the secured party from liability to the extent of the amount so paid. Said clerk of superior court shall accept such surplus from said secured party and shall execute a receipt therefor.

(2) Said clerk of superior court is liable on his official bond for the safekeeping of money so received until it is paid to the party or parties entitled thereto or until it is paid out under the order of a court of competent jurisdiction. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-504.2. Special proceedings to determine ownership of surplus. — (1) A special proceeding may be instituted before the clerk of superior court by any person claiming any portion of the surplus paid into the clerk's office under G.S. 25-9-504.1, to determine who is entitled thereto.

(2) All other persons who have filed with the clerk notice of their claim to the aforesaid surplus or any part thereof, or who, as far as the petitioner(s) know, asserts any claim to said surplus or any part thereof, shall be made defendants in the proceeding.

(3) If any answer is filed raising issues of fact as to the ownership of the surplus (money), the proceeding shall be transferred to the civil issue docket of the district or superior court for trial.

(4) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who have asserted a claim to the fund by petition or answer. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-505. Compulsory disposition of collateral; acceptance of the collateral as discharge of obligation. — (1) If the debtor has paid sixty percent (60%) of the cash price in the case of a purchase money security interest in consumer goods or sixty percent (60%) of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this part a secured party who has taken possession of collateral must dispose of it under G.S. 25-9-504, and if he fails to do so within 90 days after he takes possession, the debtor at his option may recover in conversion or under G.S. 25-9-507(1) on secured party's liability.

(2) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods no other notice need be given. In other cases notice shall be sent to any other secured party from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within 21 days after the notice was sent, the secured party must dispose of the collateral under G.S. 25-9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, rewrote the second sentence of subsection (2).

§ 25-9-506. Debtor's right to redeem collateral. — At any time before the secured party has disposed of collateral or entered into a contract for its disposition under G.S. 25-9-504 or before the obligation has been discharged under G.S. 25-9-505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, made certain changes in punctuation.

§ 25-9-507. Secured party's liability for failure to comply with this part. — (1) If it is established that the secured party is not proceeding in accordance with

the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service plus 10 percent (10%) of the principal amount of the debt or the time price differential plus 10 percent (10%) of the cash price.

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable. (1965, c. 700, s. 1; 1975, c. 862, s. 7.)

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted the section without change.

For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

Failure to Dispose of Collateral as Required Raises Presumption of Worth. — Creditor's failure to dispose of the collateral as required raises a presumption that the collateral was worth at least the amount of the debt. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

And places upon the creditor the burden of overcoming such presumption by proving the market value of the collateral by evidence other than the resale price. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Subsection (1) Contemplates Creditor's Right to Deficiency Judgment. — The provision of this section that a debtor has a right to recover from the creditor any loss caused by failure to comply with the Code contemplates the right to deficiency judgment by the creditor who fails to comply with the Uniform Commercial Code provisions in disposing of the collateral. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Creditor's Recovery by Deficiency Subject to Offset by Penalty under Section. — If the debtor asserts damages or penalty against the creditor under this section the creditor's recovery by deficiency is subject to credit or offset by such damages or penalty. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Credit against Debt Where Sale Not Commercially Reasonable. — Where sale is not

conducted in a commercially reasonable manner, the debt is to be credited with the amount that reasonably should have been obtained through a sale conducted in a reasonably commercial manner according to the Uniform Commercial Code. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

This section offers guidance as to what constitutes a "commercially reasonable" disposition under § 25-9-504. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Subsection (2) Does Not Give Creditor Unbridled Discretion. — Subsection (2) only prohibits second-guessing the secured party; it does not give him unbridled discretion. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

"Reasonable Commercial Practices" Necessitate Commercially Reasonable Price. — The sale of a single unit cannot be "in conformity with reasonable commercial practices among dealers" when the sale is for a commercially unreasonable price. In short "reasonable commercial practices" necessitate a commercially reasonable price. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

But All Elements of Sale Must Be Considered Together. — There may be cases in which the price paid for the collateral will be commercially reasonable even though a higher price could have been obtained at a different time or in a different market. Nor is a price which is slightly inadequate necessarily commercially unreasonable. The trier of fact

must consider all the elements of the sale together. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

Subsection (2) does not make every inadequacy in price, however slight, commercially unreasonable. A truly gross inadequacy in price, however, if established by the evidence and believed by the jury, will support a finding that the sale was not "in conformity with reasonable commercial practices among dealers." *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

But Evidence of Gross Inadequacy Raises Issue of Reasonableness of Sale. — When the debtor offers independent evidence of a gross inadequacy of price, in North Carolina, that sufficiently raises the issue of the commercial reasonableness of the sale to take the case to the jury. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E.2d 566 (1978).

Applied in *First Union Nat'l Bank v. Tectamar, Inc.*, 33 N.C. App. 604, 235 S.E.2d 894 (1977).

§ 25-9-508. Application of statute of limitations to serial notes. — When a series of notes maturing at different times is secured by a security agreement and the exercise of the power of sale or foreclosure for the satisfaction of one or more of the notes is barred by the statute of limitations, that fact does not bar the exercise of the power of sale or foreclosure for the satisfaction of indebtedness represented by other notes of the series not so barred. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, reenacted this section without change.

§ 25-9-509. Power of sale barred when foreclosure barred. — (1) Except as provided in subsection (2), no person shall exercise any power of sale contained in any security agreement, or provided by statute, when an action to foreclose the lien contained in said security agreement is barred by the statute of limitations.

(2) If a sale pursuant to a power of sale contained in a security agreement, or provided by statute, is commenced within the time allowed by the statute of limitations to foreclose the lien of such security agreement, the sale may be completed, although such compensation is effected after the time when commencement of an action to foreclose would be barred by the statute. For the purpose of this section, a sale is commenced when the notice of public sale is first posted or published as provided in this article. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, reenacted this section without change.

PART 6.

PUBLIC SALE PROCEDURES.

§ 25-9-601. Disposition of collateral by public sale. — Disposition of collateral by public proceedings as permitted by G.S. 25-9-504 may be made in accordance with the provisions of this part. The provisions of this part are not mandatory for disposition by public proceedings, but any disposition of the collateral by public sale wherein the secured party has substantially complied with the procedures provided in this part shall conclusively be deemed to be commercially reasonable in all aspects. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Editor's Note. — Section 10, c. 562, Session Laws 1967, makes the act effective at midnight June 30, 1967. See Editor's note to § 25-1-201.

The 1975 amendment, effective July 1, 1976, reenacted this section without change.

For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

Legislative Intent. — To minimize difficulties arising from § 25-9-504(3), the General Assembly has enacted this Part of Article 9. *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

A Presumption if Commercial Reasonableness In Compliance With U.C.C. — North Carolina has by statute created a conclusive presumption of commercial reasonableness if the secured party substantially complies with part 6 of Article 9 of North Carolina's Uniform Commercial Code. Part 6 of Article 9 [§ 25-9-601, et seq.] of the North Carolina U.C.C. is not a part of the "Official Text of the U.C.C." but is in effect in North Carolina. The procedure therein and the conclusive presumption created by this section appear to be peculiar to North Carolina. *Graham v. Northwestern Bank*, 16 N.C. App. 287, 192 S.E.2d 109, cert. denied, 288 N.C. 426, 192 S.E.2d 836 (1972); *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976); *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

The public sale of collateral by the secured party is conclusively presumed to be commercially reasonable when the secured party has substantially complied with the procedures set forth in Part 6 notwithstanding allegations by the debtor of inadequate and unreasonably low prices. *Graham v. Northwestern Bank*, 16 N.C. App. 287, 192 S.E.2d 109, cert. denied, 288 N.C. 426, 192 S.E.2d 836 (1972); *Wachovia Bank & Trust Co. v. Murphy*, 36 N.C. App. 760, 245 S.E.2d 101, appeal dismissed, 295 N.C. 557, 248 S.E.2d 734 (1978).

Upon determination that the secured party has substantially complied with the procedures in Part 6 of Article 9 of U.C.C., the secured party is entitled to the conclusive presumption that the sale was commercially reasonable in all aspects. *Wachovia Bank & Trust Co. v. Murphy*, 36 N.C. App. 760, 245 S.E.2d 101, appeal dismissed, 295 N.C. 557, 248 S.E.2d 734 (1978).

And This Presumption Does Not Violate Due Process. — The provision of this section which provides "any disposition of the collateral by public sale wherein the secured party has substantially complied with the procedures

provided in this part [Part 6] shall conclusively be deemed to be commercially reasonable in all aspects" does not offend the due process clause of the Fourteenth Amendment to the Constitution of the United States or the due process requirements of N.C. Const., Art. 1, § 19. *Wachovia Bank & Trust Co. v. Murphy*, 36 N.C. App. 760, 245 S.E.2d 101, appeal dismissed, 295 N.C. 557, 248 S.E.2d 734 (1978).

Prima Facie Showing of Substantial Compliance. — Where there is no perishable property, which would bring § 25-9-604 into operation; or no postponement of the public sale, which would bring § 25-9-605 into operation; or no order restraining or enjoining the public sale, which would bring § 25-9-606 into operation; a showing by the secured party that the contents of the notice of sale were substantially in accord with § 25-9-602, that the notice of sale was posted and mailed substantially in accord with § 25-9-603, and that a public sale was held in accordance with the notice of sale, makes a prima facie showing of substantial compliance with the procedures provided in Part 6 of Article 9 of the Uniform Commercial Code. *Wachovia Bank & Trust Co. v. Murphy*, 36 N.C. App. 760, 245 S.E.2d 101, appeal dismissed, 295 N.C. 557, 248 S.E.2d 734 (1978).

When Substantial Compliance Is Question of Law. — Upon a prima facie showing of substantial compliance, absent allegations and evidence of a failure to substantially comply with the contents of the notice of sale procedures, or of a failure to substantially comply with the posting and mailing of notice procedures, or of failure to hold a public sale as advertised, it is a question of law for the court whether the secured party has substantially complied with the procedures provided in Part 6 of Article 9 of the Uniform Commercial Code. *Wachovia Bank & Trust Co. v. Murphy*, 36 N.C. App. 760, 245 S.E.2d 101, appeal dismissed, 295 N.C. 557, 248 S.E.2d 734 (1978).

Commercial Reasonableness a Question of Fact Absent Presumption. — Absent the establishment of the conclusive presumption of commercial reasonableness, under this Part, a question of fact remains as to whether the sale was conducted in a commercially reasonable manner under § 25-9-504(3). *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Quoted in North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978).

§ 25-9-602. Contents of notice of sale. — The notice of sale shall substantially:

- (a) Refer to the security agreement pursuant to which the sale is held;
- (b) Designate the date, hour and place of sale consistent with the provisions of the security agreement and the provisions found in part 6 of article 9 of chapter 25 of the General Statutes;

(c) Describe personal property to be sold substantially as it is described in the security agreement pursuant to which the power of sale is being exercised, and may add such further description as will acquaint bidders with the nature of the property;

(d) State the terms of the sale provided by the security agreement pursuant to which the sale is held, including the amount of the cash deposit, if any, to be made by the highest bidder at the sale;

(e) Include any other provisions required by the security agreement to be included therein; and

(f) State that the property will be sold subject to taxes and special assessments if it is to be so sold. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Cross Reference. — See Editor's note to § 25-9-601.

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Purpose. — The "Procedures" statutes contained in this part providing for notice have the purpose of enabling the debtor to protect his interest in the collateral by paying the debt, finding a buyer or being present at the sale to bid, so that the collateral is not sacrificed by a sale at less than its true value. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Notice of Public Sale of Securities Complied with this Section. — A notice of public sale of

securities pledged as collateral for six notes substantially complied with the requirements of this section where it listed and described all of the securities pledged as collateral for each of the six notes, although one of the security agreements was not referred to in the notice and two of the security agreements were referred to by incorrect dates. *Graham v. Northwestern Bank*, 16 N.C. App. 287, 192 S.E.2d 109, cert. denied, 288 N.C. 426, 192 S.E.2d 836 (1972).

Cited in *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976); *Wachovia Bank & Trust Co. v. Murphy*, 36 N.C. App. 760, 245 S.E.2d 101 (1978).

§ 25-9-603. Posting and mailing notice of sale. — (1) In each public sale conducted hereunder, the notice of sale shall be posted on a bulletin board provided for the posting of such legal notices, in the courthouse, in the county in which the sale is to be held, for at least five days immediately preceding the sale.

(2) In addition to the posting of notice required by subsection (1), the secured party or other party holding such public sale shall, at least five days before the date of sale, mail by registered or certified mail a copy of the notice of sale to each debtor obligated under the security agreement:

(a) at the actual address of the debtors, if known to the secured party, or

(b) at the address, if any, furnished the secured party, in writing, by the debtors, or otherwise at the last known address.

(3) In the case of consumer goods, no other notification need be sent. In other cases, in addition to mailing a copy of the notice of sale to each debtor, the secured party shall also mail a copy of said notice by registered or certified mail to any other secured party from whom the secured party has received (before sending the notice of sale to the debtor(s)) written notice of a claim of an interest in the collateral.

(4) The time for the posting of the notice of sale and the mailing of the notice required by this section shall be computed so as to exclude the first day of posting and mailing and to include the day on which the sale is to occur. Rule 6 of the North Carolina Rules of Civil Procedure shall not apply. (1967, c. 562, s. 3; 1969, c. 1115, s. 1; 1975, c. 862, s. 7; 1979, c. 579, s. 1.)

Cross Reference. — See Editor's note to § 25-9-601.

Editor's Note. — The 1969 amendment, effective at midnight June 30, 1969, rewrote subsection (3).

The 1975 amendment, effective July 1, 1976, rewrote subsection (3).

The 1979 amendment added subsection (4).

Purpose. — The "Procedures" statutes contained in this part providing for notice have

the purpose of enabling the debtor to protect his interest in the collateral by paying the debt, finding a buyer or being present at the sale to bid, so that the collateral is not sacrificed by a sale at less than its true value. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

Subsection (2) of this section must be read and construed in conjunction with subsection (3) of § 25-9-504. *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976).

The notice required under this section is mandatory and is a distinct and separate requirement from the requirement for commercial reasonableness. *North Carolina Nat'l Bank v. Burnette*, 38 N.C. App. 120, 247 S.E.2d 648 (1978), cert. granted, 296 N.C. 410, S.E.2d (1979).

Burden of Proving Notice Is on Creditor. — In actions by a creditor to obtain a deficiency judgment, the burden of proving that notice was properly sent by the creditor to the debtor rests

with the creditor. *North Carolina Nat'l Bank v. Burnette*, 38 N.C. App. 120, 247 S.E.2d 648 (1978), cert. granted, 296 N.C. 410, S.E.2d (1979).

Mailing of Joint Notice to Husband and Wife. — While the better practice would be for the secured party to make separate mailings of notice to each debtor, the mailing of a joint notice to husband and wife at the residence address where they both lived was substantial compliance within the meaning of this section. *Wachovia Bank & Trust Co. v. Murphy*, 36 N.C. App. 760, 245 S.E.2d 101, appeal dismissed, 295 N.C. 557, 248 S.E.2d 734 (1978).

Quoted in *Graham v. Northwestern Bank*, 16 N.C. App. 287, 192 S.E.2d 109 (1972).

Cited in *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976); *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

§ 25-9-604. Exception as to perishable property. — If, in the opinion of a secured party about to conduct a public sale of personal property hereunder, the property is perishable because subject to rapid deterioration or threatens to decline speedily in value, he may report such fact, together with a description of the property to the clerk of the superior court of the county in which the property is to be sold, and apply for authority to sell the property at an earlier date than is provided in this article. Upon the clerk's determination that the property is such perishable or speedily depreciating property, he shall order a sale thereof to be held at such time and place and upon such notice, if any, as he deems advisable. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Cross Reference. — See Editor's note to § 25-9-601.

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Cited in *Wachovia Bank & Trust Co. v. Murphy*, 36 N.C. App. 760, 245 S.E.2d 101 (1978); *North Carolina Nat'l Bank v. Burnette*, 38 N.C. App. 120, 247 S.E.2d 648 (1978).

§ 25-9-605. Postponement of public sale. — (1) Any person exercising a power of sale or conducting a public sale hereunder may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale:

- (a) When there are no bidders, or
- (b) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
- (c) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable in his judgment, to hold the sale on that day, or
- (d) When he is unable to hold the sale because of illness or for other good reason, or
- (e) When other good cause exists.

(2) Upon postponement of a public sale, the person exercising the power of sale shall personally, or through his agent or attorney:

- (a) at the time and place advertised for the sale, publicly announce the postponement thereof, and
- (b) on the same day, attach to or enter on the original notice of sale or a copy thereof, posted on the bulletin board provided therefor, as provided by G.S. 25-9-603, a notice of the postponement.

(3) The posted notice of postponement shall:

- (a) state that the public sale is postponed,
- (b) state the hour and date to which the public sale is postponed,
- (c) substantially state the reason for the postponement, and
- (d) be signed by the person authorized to hold the public sale, or by his agent or attorney.

(4) If a public sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to hold the public sale may readvertise the property in the same manner as he was required to advertise the sale which was not held, and may hold a public sale at such later date as is fixed in the new notice of sale. (1967, c. 562, s. 3; 1975, c. 682, s. 7.)

Cross Reference. — See Editor's note to § 25-9-601.

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Cited in ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814

(1976); Wachovia Bank & Trust Co. v. Murphy, 36 N.C. App. 760, 245 S.E.2d 101 (1978); North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978).

§ 25-9-606. Procedure upon dissolution of order restraining or enjoining sale. — (1) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, as provided in G.S. 25-9-603, provide by order that the public sale shall be held without additional notice at the time and place originally fixed therefor; or he may, in his discretion, make an order with respect thereto as provided in subsection (2).

(2) When, after the date fixed for a public sale, a judge dissolves an order restraining or enjoining said sale, he shall, by order, fix the time and place for the sale to be held upon notice to be given and in such manner and for such length of time as he deems advisable. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Cross Reference. — See Editor's note to § 25-9-601.

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

Cited in Wachovia Bank & Trust Co. v. Murphy, 36 N.C. App. 760, 245 S.E.2d 101 (1978).

§ 25-9-607. Disposition of proceeds of sale. — The proceeds of any sale or other disposition of the collateral shall be applied by the person making the sale in the manner prescribed by G.S. 25-9-504(1) and (2), 25-9-504.1 and 25-9-504.2. (1967, c. 562, s. 3; 1975, c. 862, s. 7.)

Cross Reference. — See Editor's note to § 25-9-601.

Editor's Note. — The 1975 amendment, effective July 1, 1976, reenacted this section without change.

ARTICLE 10.

*Effective Date and Repealer.***§ 25-10-101. Effective date.**

Editor's Note. — For a symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

Applied in *Yates v. Brown*, 275 N.C. 634, 170 S.E.2d 477 (1969); *Dunham's Music House, Inc. v. Asheville Theatres, Inc.*, 10 N.C. App. 242, 178 S.E.2d 124 (1970); *Gore v. George J. Ball, Inc.*, 10 N.C. App. 310, 178 S.E.2d 237 (1971); *Hall v. Gurley Milling Co.*, 347 F. Supp. 13 (E.D.N.C. 1972).

Stated in *Gore v. George J. Ball, Inc.*, 279 N.C. 192, 182 S.E.2d 389 (1971).

Cited in *Redmond v. Lilly*, 273 N.C. 446, 160 S.E.2d 287 (1968); *Southern Nat'l Bank v. Universal Acc. Corp.*, 2 N.C. App. 319, 163 S.E.2d 10 (1968); *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969); *Billings v. Joseph Harris Co.*, 290 N.C. 502, 226 S.E.2d 321 (1976).

§ 25-10-102. Specific repealer; provision for transition.

Editor's Note. — For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

Section 20-72 Not Repealed. — It would require a strained interpretation to hold that it was the intention of the General Assembly in adopting the Uniform Commercial Code to repeal the provisions of § 20-72, relating to

transfer of title to motor vehicles, without a mention of that section in the specific repealer. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

Stated in *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969); *Evans v. Everett*, 270 N.C. 352, 183 S.E.2d 109 (1971).

§ 25-10-103. General repealer.

Motor Vehicles Act Not Repealed. — The legislature did not intend to repeal the Motor Vehicles Act in the general repealer section.

Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

§ 25-10-105: Repealed by Session Laws 1967, c. 562, s. 3, effective at midnight June 30, 1967.

Cross Reference. — See Editor's note to § 25-1-201.

§ 25-10-107: Repealed by Session Laws 1967, c. 562, s. 5, effective at midnight June 30, 1967.

Cross Reference. — See Editor's note to § 25-1-201.

ARTICLE 11.

*1975 Amendatory Act — Effective Date and
Transition Provisions.*

§ 25-11-101. **Effective date.** — This act shall become effective at 12:01 A.M. on July 1, 1976. (1975, c. 862, s. 8.)

§ 25-11-101.1. **Definitions.** — (1) As used in this article, "old article 9" means: G.S. 25-1-105, 25-1-201(9), 25-1-201(37), 25-2-107, 25-5-116, and article 9 of chapter 25 of the General Statutes of North Carolina, Uniform Commercial Code, as they are in effect on June 30, 1976, immediately prior to the effective date of this act.

(2) As used in this article, "new article 9" means: G.S. 25-1-105, 25-1-201(9), 25-1-201(37), 25-2-107, 25-5-116, and article 9 of chapter 25 of the General Statutes of North Carolina, Uniform Commercial Code, as said provisions are enacted pursuant to this act, as of July 1, 1976, its effective date. (1975, c. 862, s. 8.)

§ 25-11-102. **Preservation of old transition provisions.** — The provisions of article 10 of chapter 25 of the General Statutes of North Carolina, Uniform Commercial Code, G.S. 25-10-101 through 25-10-106, thereof shall continue to apply to new article 9, and for this purpose the old article 9 and the new article 9 shall be considered one continuous statute. (1975, c. 862, s. 8.)

§ 25-11-103. **Transition to new article 9; general rule.** — (1) Transactions validly entered into after midnight on June 30, 1967, and before July 1, 1976, and which were subject to the provisions of old article 9 and which would be subject to this act as amended if they had been entered into after July 1, 1976, and the rights, duties and interests following from such transactions remain valid after the latter date and may be terminated, completed, consummated or enforced as required or permitted by the new article 9.

(2) Security interests arising out of such transactions which are perfected when new article 9 becomes effective shall remain perfected until they lapse as provided in new article 9, and may be continued as permitted by new article 9, except as stated in G.S. 25-11-105. (1975, c. 862, s. 8.)

§ 25-11-104. **Transition provisions on change of requirement of filing.** — A security interest for the perfection of which filing or the taking of possession was required under old article 9 and which attached prior to July 1, 1976, but was not perfected shall be deemed perfected on July 1, 1976, if new article 9 permits perfection without filing or authorizes filing in the office or offices where prior ineffective filing was made. (1975, c. 862, s. 8.)

§ 25-11-105. **Transition provisions on change of place of filing.** — (1) A financing statement or continuation statement filed prior to July 1, 1976, which shall not have lapsed prior to July 1, 1976, shall remain effective for the period provided in the old article 9, but not less than five years after the filing.

(2) With respect to any collateral acquired by the debtor subsequent to July 1, 1976, any effective financing statement or continuation statement described in this section shall apply only if the filing or filings are in the office or offices that would be appropriate to perfect the security interests in the new collateral under new article 9.

(3) The effectiveness of any financing statement or continuation statement filed prior to July 1, 1976, may be continued by a continuation statement as permitted by new article 9, except that if new article 9 requires a filing in an

office where there was no previous financing statement, a new financing statement conforming to G.S. 25-11-106 shall be filed in that office.

(4) If the record of a mortgage of, or a deed of trust on, real estate would have been effective as a fixture filing of goods described therein if new article 9 had been in effect on the date of recording the mortgage or deed of trust, the mortgage or deed of trust shall be deemed effective as a fixture filing as to such goods under subsection (6) of G.S. 25-9-402 of the new article 9 on July 1, 1976. (1975, c. 862, s. 8.)

§ 25-11-106. Required refilings. — (1) If a security interest is perfected or has priority when this act takes effect as to all persons or as to certain persons without any filing or recording, and if the filing of a financing statement would be required for the perfection or priority of the security interest against those persons under new article 9, the perfection and priority rights of the security interest continue until three years after July 1, 1976. The perfection will then lapse unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing.

(2) If a security interest is perfected when new article 9 takes effect under a law other than chapter 25 of the General Statutes, Uniform Commercial Code, which requires no further filing, refiling or recording to continue its perfection, perfection continues until and will lapse three years after new article 9 takes effect, unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing, or unless under subsection (3) of G.S. 25-9-302 the other law continues to govern filing.

(3) If a security interest is perfected by a filing, refiling or recording under a law repealed by this act which required further filing, refiling or recording to continue its perfection, perfection continues and will lapse on the date provided by the law so repealed for such further filing, refiling or recording unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing.

(4) A financing statement may be filed within six months before the perfection of a security interest which would otherwise lapse. Any such financing statement may be signed by either the debtor or the secured party. It must identify the security agreement, statement or notice (however denominated in any statute or other law repealed or modified by this act), state the office where and the date when the last filing, refiling or recording, if any, was made with respect thereto, and the filing number, if any, or book and page, if any, of recording and further state that the security agreement, statement or notice, however denominated, in another filing office under chapter 25, Uniform Commercial Code, or under any statute or other law repealed or modified by this act is still effective. G.S. 25-9-401 and 25-9-103 determine the proper place to file such a financing statement. Except as specified in this subsection, the provisions of G.S. 25-9-403(3) for continuation statements apply to such a financing statement. (1975, c. 862, s. 8.)

§ 25-11-107. Transition provisions as to priorities. — Except as otherwise provided in article 11, old article 9 shall apply to any questions of priority if the positions of the parties were fixed prior to July 1, 1976. In other cases questions of priority shall be determined by new article 9. (1975, c. 862, s. 8.)

Cited in *Provident Fin. Co. v. Beneficial Fin. Co.*, 36 N.C. App. 401, 244 S.E.2d 510 (1978).

§ 25-11-108. Presumption that rule of law continues unchanged. — Unless a change in law has clearly been made, the provisions of new article 9 shall be deemed declaratory of the meaning of the old article 9. (1975, c. 862, s. 8.)

Chapter 25A.

Retail Installment Sales Act.

Sec.	Sec.
25A-1. Scope of act.	25A-25. Preservation of consumers' claims and defenses.
25A-2. "Consumer credit sale" defined.	25A-26. Substitution of collateral.
25A-3. "Payable in installments" defined.	25A-27. Application of payments.
25A-4. "Goods" defined.	25A-28. Form of consumer credit installment sale contract.
25A-5. "Services" defined.	25A-29. Default charges.
25A-6. "Seller" defined.	25A-30. Deferral charges.
25A-7. "Cash price" defined.	25A-31. Consolidation and refinancing.
25A-8. "Finance charge" defined.	25A-32. Rebates on prepayment.
25A-9. "Amount financed" defined.	25A-33. Terms of payments.
25A-10. "Official fees" defined.	25A-34. Balloon payments.
25A-11. "Revolving charge account contract" defined.	25A-35. Statement of account.
25A-12. "Consumer credit installment sale contract" defined.	25A-36. Certificates of insurance and rebates.
25A-13. "Consumer Credit Protection Act" defined.	25A-37. Referral sales.
25A-14. Finance charge rates for revolving charge account contracts.	25A-38. "Home-solicitation sale" defined.
25A-15. Finance charge rates for consumer credit installment sale contracts.	25A-39. Buyer's right to cancel.
25A-16. Transfer of equity.	25A-40. Form of agreement or offer; statement of buyer's rights.
25A-17. Additional charges for insurance.	25A-41. Restoration of down payment; retention of goods.
25A-18. Confession of judgment.	25A-42. Duties as to care and return of goods; no compensation for services prior to cancellation.
25A-19. Acceleration.	25A-43. Unconscionability.
25A-20. Disclaimer of warranty.	25A-44. Remedies and penalties.
25A-21. Attorneys' fees.	25A-45. Conflict with Consumer Credit Protection Act.
25A-22. Receipts for payments; return of title documents upon full payment.	
25A-23. Collateral taken by the seller.	
25A-24. Identification of instruments of indebtedness.	

Editor's Note. — Session Laws 1971, c. 796, s. 2, provides: "This act shall apply to contracts and

transactions entered into on and after January 1, 1972."

§ 25A-1. Scope of act. — This Chapter applies only to consumer credit sales as hereinafter defined, except that G.S. 25A-37, referral sales, applies to all sales of goods or services as provided therein. This Chapter does not apply to a bona fide direct loan transaction in which a lender makes a direct loan to a borrower, and such lender is not regularly engaged, directly or indirectly, in the sale of goods or the furnishing of services as defined in this Chapter.

Except for G.S. 25A-37, referral sales, this Chapter does not apply to any party or transaction that is not also subject to the provisions of the Consumer Credit Protection Act (Federal Truth-in-Lending Act). (1971, c. 796, s. 1.)

Editor's Note. — For article discussing the scope of this chapter and its impact on the agreement and performance stages of a consumer credit transaction, see 50 N.C.L. Rev.

767 (1972). For survey of 1977 commercial law, see 56 N.C.L. Rev. 915 (1978).

Cited in State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

§ 25A-2. "Consumer credit sale" defined. — (a) Except as provided in subsection (c) of this section, a "consumer credit sale" is a sale of goods or services in which

- (1) The seller is one who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit,
- (2) The buyer is a natural person,
- (3) The goods or services are purchased primarily for a personal, family, household or agricultural purpose,
- (4) Either the debt representing the price of the goods or services is payable in installments or a finance charge is imposed, and
- (5) The amount financed does not exceed twenty-five thousand dollars (\$25,000).

(b) "Sale" includes but is not limited to any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods and services involved, and it is agreed that the bailee or lessee will become, or for no other or for a nominal consideration, has the option to become, the owner of the goods and services upon full compliance with his obligations under such contract.

(c) A sale in which the seller allows the buyer to purchase goods or services pursuant to a credit card issued by someone other than a seller that is engaged in part or entirely in the business of selling goods or services or similar arrangement is not a consumer credit sale. A sale in which the seller allows the buyer to purchase goods or services pursuant to a credit card issued by the seller, a subsidiary or a parent corporation of the seller, a principal supplier of the seller or any corporation having shareholders in common with the seller holding over twenty-five percent (25%) of the voting stock in each corporation is a consumer credit sale within the terms of this Chapter.

(d) For the purposes of this Chapter, a consumer credit sale shall be deemed to have been made in this State, and therefore subject to the provisions of this Chapter, if the seller offers or agrees in this State to sell to a buyer who is a resident of this State, or if such buyer accepts or makes the offer in this State to buy, regardless of the situs of the contract as specified therein.

Any solicitation or communication to sell, oral or written, originating outside of this State, but forwarded to and received in this State by a buyer who is a resident of this State, shall be deemed to be an offer or agreement to sell in this State.

Any solicitation or communication to buy, oral or written, originating within this State, from a buyer who is a resident of this State, but forwarded to and received by a retail seller outside of this State, shall be deemed to be an acceptance or offer to buy in this State. (1971, c. 796, s. 1; 1979, c. 706, s. 1.)

Editor's Note. — The 1979 amendment, Cited in *General Elec. Credit Corp. v. Ball*, 40 N.C. App. 586, 253 S.E.2d 574 (1979). effective July 1, 1979, added subsection (d).

§ 25A-3. "Payable in installments" defined. — A debt is "payable in installments" when the buyer is required or permitted by agreement to make payment in more than four installments, excluding a down payment, and whether or not a finance charge is imposed by the seller. (1971, c. 796, s. 1.)

§ 25A-4. "Goods" defined. — (a) "Goods" means all things which are moveable at the time of the sale or at the time the buyer takes possession, including goods not in existence at the time the transaction is entered into and goods which are furnished or used at the time of sale or subsequently in modernization, rehabilitation, repair, alteration, improvement or construction on real property so as to become a part thereof whether or not they are severable therefrom. "Goods" also includes merchandise certificates.

(b) "Merchandise certificate" means a writing issued by a seller not redeemable in cash and usable in its face amount in lieu of cash in exchange for goods and services. (1971, c. 796, s. 1.)

§ 25A-5. "Services" defined. — (a) "Services" includes:

- (1) Work, labor, and other personal services; and
- (2) Privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals and other similar services.

(b) "Services" does not include:

- (1) Services for which the cost is by law fixed or approved by or filed with or subject to approval or disapproval by the United States or the State of North Carolina or any agency, instrumentality or subdivision thereof;
- (2) Insurance premiums financing covered by G.S. 58-55 through G.S. 58-61.2; or
- (3) Insurance provided by an insurer that is licensed to do business in this State. (1971, c. 796, s. 1.)

§ 25A-6. "Seller" defined. — "Seller" means one regularly engaged in the business of selling goods or services. Unless otherwise provided, "seller" also means and includes an assignee of the seller's right to payment but use of the term does not itself impose on an assignee any obligation of the seller with respect to events occurring before the assignment. (1971, c. 796, s. 1.)

§ 25A-7. "Cash price" defined. — "Cash price" of goods and services means the price at which the goods or services are offered for sale by the seller to cash buyers in the ordinary course of business and may include

- (1) Applicable sales, use, and excise and documentary stamp taxes; and
- (2) The cash price of accessories or related services such as installation, delivery, servicing, repairs or alterations. (1971, c. 796, s. 1.)

§ 25A-8. "Finance charge" defined. — (a) "Finance charge" means the sum of all charges payable directly or indirectly by the buyer and imposed by the seller as an incident to the extension of credit, including any of the following types of charges which are applicable:

- (1) Interest, time price differential, service, carrying or other similar charge however denominated;
- (2) Premium or other charges for any guarantee or insurance protecting the seller against the buyer's default or other credit loss;
- (3) Loan fee, finder's fee or similar charge; and
- (4) Fee for an appraisal, investigation or credit report.

(b) Finance charge does not include transfer of equity fees, substitution of collateral fees, default or deferment charges, or additional charges for insurance as permitted by G.S. 25A-17 or charges for insurance excluded by Section 226.4(a) of Regulation Z promulgated pursuant to section 105 of the Consumer Credit Protection Act.

(c) With respect to a transaction in which the seller acquires a security interest in real property, finance charge does not include charges excluded by section 226.4(e) of Regulation Z promulgated pursuant to section 105 of the Consumer Credit Protection Act. (1971, c. 796, s. 1.)

§ 25A-9. "Amount financed" defined. — (a) "Amount financed" means the total of the following to the extent that payment is deferred by the seller:

- (1) The cash price of the goods or services less the amount of any down payment whether made in cash or property traded in,

- (2) The amount actually paid or to be paid by the seller pursuant to an agreement with the buyer to discharge a security interest or lien on property traded in,
 - (3) Additional charges for insurance described in G.S. 25A-8(b) and charges referred to in G.S. 25A-8(c), and
 - (4) Official fees as described in G.S. 25A-10, to the extent they are itemized and disclosed to the buyer.
- (b) If not included in the cash price, the amount financed includes any applicable sales, use or documentary stamp taxes and any amount actually paid or to be paid by the seller for registration, certificate of title or license fees. (1971, c. 796, s. 1.)

§ 25A-10. "Official fees" defined. — "Official fees" means

- (1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest related to a consumer credit sale; or
- (2) Premiums payable for insurance in lieu of perfecting a security interest otherwise required by the seller in connection with a consumer credit sale if the premium does not exceed the fees or charges described in subdivision (1) of this section which would otherwise be payable. (1971, c. 796, s. 1.)

§ 25A-11. "Revolving charge account contract" defined. — "Revolving charge account contract" means an agreement or understanding between a seller and a buyer under which consumer credit sales may be made from time to time, under the terms of which a finance charge or service charge is to be computed in relation to the buyer's unpaid balance from time to time, and under which the buyer has the privilege of paying the balance in full or in installments. This definition shall not affect the meaning of the term "revolving charge account" appearing in G.S. 24-11(a). (1971, c. 796, s. 1.)

Cited in *State Wholesale Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

§ 25A-12. "Consumer credit installment sale contract" defined. — "Consumer credit installment sale contract" means the agreement between a buyer and a seller in a consumer credit sale other than a sale made pursuant to a revolving charge account. (1971, c. 796, s. 1.)

§ 25A-13. "Consumer Credit Protection Act" defined. — "Consumer Credit Protection Act" means the Consumer Credit Protection Act, an act of Congress of May 29, 1968, as amended (Public Law 90-321; 82 Stat. 146; 15 U.S.C. 1601 et seq.), and regulations and rulings promulgated thereunder. (1971, c. 796, s. 1.)

§ 25A-14. Finance charge rates for revolving charge account contracts. — (a) The finance-charge rate for a consumer credit sale made pursuant to a revolving charge account contract may not exceed the rates provided for revolving credit by G.S. 24-11(a).

(b) In the event the revolving charge account contract is secured in whole or in part by a security interest in real property, then the finance-charge rate shall not exceed the rate set out in G.S. 25A-15(d).

(c) No default or deferral charge shall be imposed by the seller in connection with a revolving charge-account contract, except as specifically provided for in G.S. 24-11(a). (1971, c. 796, s. 1.)

§ 25A-15. Finance charge rates for consumer credit installment sale contracts. — (a) With respect to a consumer credit installment sale contract, a seller may contract for and receive a finance charge not exceeding that permitted by this section. For the purposes of this section, the finance charge rates are the rates that are required to be disclosed by the Consumer Credit Protection Act.

(b) Except as hereinafter provided, the finance charge rate for a consumer credit installment sales contract may not exceed:

- (1) Twenty-two percent (22%) per annum where the amount financed is less than one thousand five hundred dollars (\$1,500),
- (2) Twenty percent (20%) per annum where the amount financed is one thousand five hundred dollars (\$1,500) or greater, but less than two thousand dollars (\$2,000),
- (3) Eighteen percent (18%) per annum where the amount financed is two thousand dollars (\$2,000) or greater, but less than three thousand dollars (\$3,000),
- (4) Sixteen percent (16%) per annum where the amount financed is three thousand dollars (\$3,000) or greater, but less than five thousand dollars (\$5,000), and
- (5) Fourteen percent (14%) per annum where the amount financed is five thousand dollars (\$5,000) or greater,

except that a minimum finance charge of five dollars (\$5.00) may be imposed.

(c) Notwithstanding the provisions of subsection (b) of this section, a finance charge rate not to exceed twenty-nine percent (29%) per annum may be imposed in a consumer credit installment sale contract repayable in not less than six installments for a self-propelled motor vehicle which is three model years or older in age at the time of the sale and the amount financed does not exceed one thousand five hundred dollars (\$1,500), except that a minimum finance charge of fifteen dollars (\$15.00) may be imposed.

(d) Notwithstanding the provisions of subsections (b) and (c), above, in the event that the amount financed in a consumer credit sale contract is secured in whole or in part by a security interest in real property, the finance charge rate may not exceed twelve percent (12%) per annum.

(e) A seller may not divide a single credit sale transaction into two or more sales to avoid the limitations as to maximum finance charges imposed by this section. (1971, c. 796, s. 1.)

§ 25A-16. Transfer of equity. — If a buyer voluntarily transfers his rights in collateral pursuant to G.S. 25-9-311 and the seller agrees, the seller may impose a transfer fee not to exceed ten percent (10%) of the unpaid balance of the debt or thirty-five dollars (\$35.00), whichever is less. (1971, c. 796, s. 1.)

§ 25A-17. Additional charges for insurance. — (a) As to revolving charge account contracts defined in G.S. 25A-11, in addition to the finance charges permitted in G.S. 24-11(a), a seller in a consumer credit sale may contract for and receive additional charges or premiums for insurance written in connection with any consumer credit sale, against loss of or damage to property securing the debt pursuant to G.S. 25A-23, provided a clear, conspicuous and specific statement in writing is furnished by the seller to the buyer setting forth the cost of the insurance if obtained from or through the seller and stating that the buyer may choose the insurer through which the insurance is obtained.

(b) As to revolving charge account contracts defined in G.S. 25A-11, insurance that is required by a seller and is not an additional charge permitted by subsection (a) of this section, shall be included in the finance charge as computed according to G.S. 24-11(a).

(c) As to consumer credit installment sale contracts defined in G.S. 25A-12, in addition to the finance charges permitted in G.S. 25A-15, a seller in a consumer credit sale may contract for and receive additional charges or premiums (i) for insurance written in connection with any consumer credit sale, for loss of or damage to property or against liability arising out of the ownership or use of property, provided a clear, conspicuous and specific statement in writing is furnished by the seller to the buyer setting forth the cost of the insurance if obtained from or through the seller and stating that the buyer may choose the person through which the insurance is to be obtained; (ii) for credit life, accident, health or loss of income insurance, written in connection with any consumer credit sale, provided the insurance coverage is not required by the seller and this fact is clearly and conspicuously disclosed in writing to the buyer; and any buyer desiring such insurance coverage gives specific dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance. (1971, c. 796, s. 1.)

§ 25A-18. Confession of judgment. — A buyer may not authorize any person to confess judgment on a claim arising out of a consumer credit sale. An authorization in violation of this section is void. (1971, c. 796, s. 1.)

§ 25A-19. Acceleration. — With respect to a consumer credit sale, the agreement may not provide for repossession of any goods or acceleration of the time when any part or all of the time balance becomes payable other than for breach by the buyer of any promise or condition clearly set forth in the agreement. (1971, c. 796, s. 1.)

§ 25A-20. Disclaimer of warranty. — With respect to any consumer credit sale, the agreement may not contain any provision limiting, excluding, modifying or in any manner altering the terms of any express warranty given by any seller (excluding assignees) to any buyer and made a part of the basis of the bargain between the original parties. (1971, c. 796, s. 1.)

§ 25A-21. Attorneys' fees. — With respect to a consumer credit sale:

- (1) In the event that the seller institutes a suit and prevails in the litigation and obtains a money judgment, the presiding judge shall allow a reasonable attorney's fee to the duly licensed attorney representing the seller in such suit, said attorney's fee to be taxed to the buyer as part of the court costs.
- (2) In the event that a seller instituting suit does not prevail in the litigation, the presiding judge shall allow a reasonable attorney's fee to the duly licensed attorney representing the buyer in such suit, said attorney's fee to be taxed to the seller as a part of the court costs. (1971, c. 796, s. 1.)

§ 25A-22. Receipts for payments; return of title documents upon full payment. — (a) When any payment is made under any consumer credit sale transaction, the person receiving such payment shall, if the payment is made in cash, give the buyer a written receipt therefor. If the buyer specifies that the payment is made on one of several obligations, the receipt shall so state.

(b) Upon the payment of all sums for which the buyer is obligated under a consumer credit sale, the seller shall promptly release any security interest in accordance with the terms of G.S. 25-9-404 or G.S. 20-58.4, whichever is applicable. In the event a security interest in real property is involved, the seller shall take such action as is necessary to enable the lien to be discharged of record under the provisions of G.S. 45-37. (1971, c. 796, s. 1.)

§ 25A-23. Collateral taken by the seller. — (a) The seller in a consumer credit sale may take a security interest only in the following property of the buyer to secure the debt arising from the sale:

- (1) The property sold,
- (2) Property previously sold by the seller to the buyer and in which the seller has an existing security interest,
- (3) Personal property to which the property sold is installed, if the amount financed is more than three hundred dollars (\$300.00),
- (4) Real property to which the property sold is affixed, if the amount financed is more than one thousand dollars (\$1,000), and
- (5) A self-propelled motor vehicle to which repairs are made, if the amount financed exceeds one hundred dollars (\$100.00).
- (6) Any property which is used for agricultural purposes, if the property sold is to be used in the operation of an agricultural business.

(b) A security interest taken in property other than that permitted in subsection (a) of this section shall be void and not enforceable.

(c) Nothing in this section shall affect any right or liens granted by Chapter 44A of the General Statutes.

(d) The provisions of G.S. 24-11(a), limiting the taking of a security interest in property under an open end credit or similar plan, shall not apply to revolving charge account contracts regulated by this Chapter; provided, however, the application of payments rule set out in G.S. 25A-27 shall apply to such contracts; provided further, that in any action initiated by the seller for the possession of such property, a judgment for the possession thereof shall be restricted to commercial units (as defined in G.S. 25-2-105(6)) for which the cash price was one hundred dollars (\$100.00) or more. (1971, c. 796, s. 1; 1977, c. 508; c. 789, s. 1.)

Editor's Note. — The first 1977 amendment added subdivision (6) to subsection (a).

The second 1977 amendment added subsection (d).

Session Laws 1977, c. 789, s. 2, provides, in part, that the act is intended to clarify existing law.

§ 25A-24. Identification of instruments of indebtedness. — With respect to consumer credit sales, each instrument of indebtedness shall be identified on the face of the instrument as a consumer credit document, or otherwise clearly indicate on its face that it arises out of a consumer credit sale, provided, that such designation of an instrument of indebtedness regarding as sale which is not by definition a "consumer credit sale," shall not solely because of such designation cause the transaction to be a consumer credit sale. (1971, c. 796, s. 1.)

§ 25A-25. Preservation of consumers' claims and defenses. — (a) In a consumer credit sale, a buyer may assert against the seller, assignee of the seller, or other holder of the instrument or instruments of indebtedness, any claims or defenses available against the original seller, and the buyer may not waive the right to assert these claims or defenses in connection with a consumer credit sales transaction. Affirmative recovery by the buyer on a claim asserted against an assignee of the seller or other holder of the instrument of indebtedness shall not exceed amounts paid by the buyer under the contract.

(b) Every consumer credit sale contract shall contain the following provision in at least ten-point boldface type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

(c) Compliance with the requirements of the Federal Trade Commission rule on preservation of consumer claims and defenses is considered full compliance with this act. (1971, c. 796, s. 1; 1977, c. 921.)

Editor's Note. — The 1977 amendment, effective June 30, 1978, deleted "if the debt is secured in whole or in part by a security interest in real property" following "consumer credit sale" in the first sentence of subsection (a), inserted "claims or" preceding "defenses" in two places and "the right to assert" after "buyer may not waive" in the first sentence of

subsection (a), rewrote subsection (b), and added subsection (c).

Applied in *General Elec. Credit Corp. v. Ball*, 40 N.C. App. 586, 253 S.E.2d 574 (1979).

Cited in *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

§ 25A-26. Substitution of collateral. — Subject to the provisions of G.S. 25A-23, if all involved parties agree, there may be a substitution of collateral under a security instrument in a consumer credit sale. For such substitution, the seller may impose a fee not to exceed ten percent (10%) of the unpaid balance of the debt or fifteen dollars (\$15.00), whichever is less. (1971, c. 796, s. 1.)

§ 25A-27. Application of payments. — (a) Where a seller in a consumer credit sale makes a subsequent sale to a buyer and takes a security interest pursuant to G.S. 25A-23 in goods previously purchased by the buyer from the seller, the seller shall make application of payments received, for the purpose of determining the amount of the debt secured by the various security interests, as follows:

- (1) The entire amount of all payments made prior to such subsequent purchase shall be deemed to have been applied to the previous purchases, and
- (2) Unless otherwise designated by the buyer, the amount of down payment on such subsequent purchase shall be applied entirely to such subsequent purchase, and
- (3) All subsequent payments shall be applied to the various purchases in the same proportion or ratio as the original cash prices of the various purchases bear to one another, except that, where the amount of the payments is increased after the subsequent purchase, the seller shall have the option to apply the amount of the increase to the subsequent sale and the balance of the subsequent payments to all sales on a cash price pro rata basis.

(b) Where a seller and a buyer agree to consolidate two or more consumer credit installment sale contracts pursuant to G.S. 25A-31, the seller shall apply payments received, for the purpose of determining the amount of the debt secured by the various security interests, as follows:

- (1) The entire amount of all payments received prior to the consolidation shall be applied to the respective contracts under which the payments were made, and
- (2) All subsequent payments shall be applied to the various contracts in the same proportion or ratio as the original cash prices in the various contracts bear to one another, except that, where the amount of the

installment payments is increased after the consolidation the seller shall have the option to apply the amount of the increase to the contract last executed and the balance of subsequent payments to all contracts on a cash price pro rata basis. (1971, c. 796, s. 1.)

§ 25A-28. Form of consumer credit installment sale contract. — Every consumer credit installment sale contract shall be in writing, dated and signed by the buyer. (1971, c. 796, s. 1.)

§ 25A-29. Default charges. — If any installment is past due for 10 days or more according to the original terms of the consumer credit installment sale contract, a default charge may be made in an amount not to exceed five percent (5%) of the installment past due or six dollars (\$6.00), whichever is the lesser. A default charge may be imposed only one time for each default.

If a default charge is deducted from a payment made on the contract and such deduction results in a subsequent default on a subsequent payment, no default charge may be imposed for such default.

If a default charge has been once imposed with respect to a particular default in payment, no default charge shall be imposed with respect to any future payments which would not have been in default except for the previous default.

A default charge for any particular default shall be deemed to have been waived by the seller unless, within 45 days following the default, (i) the charge is collected or (ii) written notice of the charge is sent to the buyer. (1971, c. 796, s. 1.)

§ 25A-30. Deferral charges. — (a) A seller may, by agreement with the buyer, defer the due date of all or any part of one or more installments under an existing consumer credit installment sale contract.

(b) Except as provided by subsections (e) and (f) of this section, a deferral agreement must be in writing, dated and signed by the parties.

(c) A deferral agreement may provide for a deferral charge not to exceed the rate of one and one-half percent (1½%) of each installment for each month from the date which such installment or part thereof would otherwise have been payable to the date when such installment or part thereof is made payable under the deferral agreement.

(d) If a deferral charge is made pursuant to a deferral agreement, a default charge provided in G.S. 25A-29 may be imposed only if the installment as deferred is not paid when due and no new deferral agreement is entered into with respect to that installment.

(e) If the deferral agreement extends the due date of only one installment, the agreement need not be in writing.

(f) A deferral agreement for which no charge is made shall not be subject to subsections (b), (c) or (d) of this section. (1971, c. 796, s. 1.)

§ 25A-31. Consolidation and refinancing. — (a) A seller and a buyer may agree at any time to refinance an existing consumer credit installment sale contract or to consolidate into a single debt repayable on a single schedule of payments, two or more consumer credit installment sale contracts.

(b) A refinancing or consolidation agreement must be in writing, dated and signed by the parties.

(c) The refinancing or consolidation agreement may provide for a finance charge which shall not exceed the rates provided in G.S. 25A-15, with the amount financed being the unpaid time balance of the contract or contracts refinanced or consolidated, less the rebate provided by G.S. 25A-32. In computing the rebate to be credited to the previous time balances for purposes of this section, no prepayment charge shall be imposed. (1971, c. 796, s. 1.)

§ 25A-32. Rebates on prepayment. — Notwithstanding any provision in a consumer credit installment sale contract to the contrary, any buyer may satisfy the debt in full at any time before maturity, and in so satisfying such debt, shall receive a rebate, the amount of which shall be computed under the "rule of 78's," as follows:

"The amount of such rebate shall represent as great a proportion of the finance charge (less a prepayment charge of ten percent (10%) of the unpaid balance, not to exceed twenty-five dollars (\$25.00)) as the sum of the periodical time balances after the date of prepayment in full bears to the sum of all the periodical time balances under the schedule of payments in the original contract." No rebate is required if the amount thereof is less than one dollar (\$1.00).

If the prepayment is made otherwise than on the due date of an installment, it shall be deemed to have been made on the installment due date nearest in time to the actual date of payment.

If a seller obtains a judgment on a debt arising out of a consumer credit installment sale or the seller repossesses the collateral securing the debt, the seller shall credit the buyer with a rebate as if the payment in full had been made on the date the judgment was obtained or 15 days after the repossession occurred. If the seller obtains a judgment and repossesses the collateral, the seller shall credit the buyer with a rebate as if payment in full had been made on the date of the judgment or 15 days after the repossession, whichever occurs earlier. (1971, c. 796, s. 1.)

§ 25A-33. Terms of payments. — A consumer credit installment sale contract shall provide for complete payment of all charges due under the contract, including the amount financed, the finance charge, and additional insurance charges, if any, within a period from the time of the sale of

- (1) Forty-two months, if the amount financed is less than one thousand five hundred dollars (\$1,500), or
- (2) Sixty-four months, if the amount financed is one thousand five hundred dollars (\$1,500) or greater, but less than two thousand five hundred dollars (\$2,500), or
- (3) One hundred and twenty-two months, if the amount financed is two thousand five hundred dollars (\$2,500) or greater, but less than five thousand dollars (\$5,000), or
- (4) One hundred and eighty-two months, if the amount financed is five thousand dollars (\$5,000) or greater, but less than ten thousand dollars (\$10,000), or
- (5) As the contract provides, if the amount financed is ten thousand dollars (\$10,000) or greater.

The provisions of this section shall not apply to a consumer credit installment sale contract executed in connection with any financing which is insured under regulations of the Federal Housing Administration or the Veterans Administration. (1971, c. 796, s. 1; 1973, c. 1446, s. 3.)

Editor's Note. — The 1973 amendment substituted "or" for "of" in subdivision (3).

§ 25A-34. Balloon payments. — With respect to a consumer credit sale, other than one pursuant to a revolving charge account, no scheduled payment may be more than ten percent (10%) (except the final payment may be twenty-five percent (25%)) larger than the average of earlier scheduled payments. This provision does not apply when the payment schedule is adjusted to the seasonal or irregular income of the buyer. (1971, c. 796, s. 1.)

§ 25A-35. Statement of account. — (a) One time during each 12-month period following execution of a consumer credit installment sale contract and when the buyer repays the debt early, the buyer shall be entitled upon request and without charge to a statement of account from the seller. The statement of account shall contain the following information identified as such in the statement:

- (1) The itemized amounts paid by or on behalf of the buyer to the date of the statement of account, except that upon early termination of the contract by prepayment or otherwise, the statement shall include itemized charges for expenses of repossession, storage and legal expenses;
- (2) The itemized amounts, if any, which have become due but remain unpaid, including any charges for defaults, expenses of repossession and deferral charges;
- (3) The number of installment payments and the dollar amount of each installment not due but still to be paid and the remaining period the contract is to run.

(b) The buyer may request and shall be entitled to additional statements of account but for such additional statements the seller may impose a charge of one dollar (\$1.00).

(c) If the buyer requests information for income tax purposes as to the amount of the finance charges, the seller shall provide such information within 30 days without charge but only once in each calendar year. (1971, c. 796, s. 1.)

§ 25A-36. Certificates of insurance and rebates. — (a) Within 45 days following the purchase of insurance by the buyer from or through the seller, the seller shall deliver, send or cause to be sent to the buyer a policy or policies of such insurance or a certificate or certificates thereof. If such insurance is cancelled, or the premium adjusted, any rebate received by the seller shall be promptly applied to the purchase of other similar insurance, credited to the buyer's account, or rebated to the buyer. Unless otherwise required by law or the provisions of the policy, rebates of cancelled insurance shall be computed under the rule of 78's, without the deduction of a prepayment charge.

(b) In those cases where the insurance premium is added in the contract, and the buyer did not actually pay the premium, the return premium plus unearned finance charge on the amount of returned premium (at the same rate as used in the contract) shall be credited to the unpaid balance of the contract. If the required insurance premium is adjusted upward by the insurance company or is added in accordance with the contract, the buyer, after 10 days' notice,

- (1) May pay the additional premium, or
- (2) Have the additional premium plus finance charge (at the same rate as used in the contract) added to the unpaid balance and spread equally over the remaining installments unpaid, provided, the seller may require a buyer who wishes to finance such additional premium to be financed by the seller in accordance with North Carolina insurance regulations. (1971, c. 796, s. 1; 1977, c. 650.)

Editor's Note. — The 1977 amendment substituted "unpaid" for "not yet due" in subdivision (2) of subsection (b).

§ 25A-37. Referral sales. — The advertisement for sale or the actual sale of any goods or services (whether or not a consumer credit sale) at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales to persons suggested by the purchaser, is declared to be unlawful. Any obligation of a buyer arising under such a sale shall be void

and a nullity and a buyer shall be entitled to recover from the seller any consideration paid to the seller upon tender to the seller of any tangible consumer goods made the basis of the sale. (1971, c. 796, s. 1.)

Cited in State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

§ 25A-38. "Home-solicitation sale" defined. — "Home-solicitation sale" means a consumer credit sale of goods or services in which the seller or a person acting for him engages in a personal solicitation of the sale at a residence of the buyer and the buyer's agreement or offer to purchase is there given to the seller or a person acting for him. It does not include

- (1) A sale made to a buyer who has previously engaged in a similar business transaction with the seller;
- (2) A sale made pursuant to a preexisting revolving charge account;
- (3) A sale made pursuant to negotiations between the parties on the premises of a business establishment at a fixed location where such goods or services are offered or exhibited for sale;
- (4) A sale which is regulated by the provisions of Section 226.9 of Regulation Z promulgated pursuant to Section 105 of the Consumer Credit Protection Act; or
- (5) Sales of personal wearing apparel, motor vehicles defined in G.S. 20-286(10), farm equipment and goods and services to be utilized within 10 days in connection with funeral services. (1971, c. 796, s. 1; 1973, c. 672.)

Editor's Note. — The 1973 amendment, effective July 1, 1973, inserted "to be" and "within 10 days" in subdivision (5).

§ 25A-39. Buyer's right to cancel. — (a) Except as provided in subsection (e) of this section, in addition to any right otherwise to revoke an offer, the buyer has the right to cancel a home-solicitation sale until midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase which complies with G.S. 25A-40, or which complies with the requirements of the Federal Trade Commission Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales.

(b) Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement or offer to purchase.

(c) Notice of cancellation, if given by mail, is given when it is deposited in the United States mail properly addressed and postage prepaid.

(d) Unless the seller complies with G.S. 25A-40(b), notice of cancellation given by the buyer need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the buyer not to be bound by the home-solicitation sale.

(e) The buyer may not cancel a home-solicitation sale if the buyer requests the seller in a separate writing to provide goods or services without delay because of an urgency or an emergency, and

- (1) The seller in good faith makes a substantial beginning of performance of the contract before the buyer gives notification of cancellation,
- (2) In the case of goods, the goods cannot be returned to the seller in substantially as good condition as when received by the buyer, and
- (3) Unless the buyer returns the goods, if any, to the seller at his expense.

(f) A buyer, who has not received delivery of the goods and services from the seller in a home-solicitation sale within 30 days following the execution of the

contract (and such delay is the fault of the seller), shall have the right at any time thereafter before acceptance of the goods and services to rescind the contract and to receive a refund of all payments made and to a return of all goods traded in to the seller on account of or in contemplation of such contract, or if the goods traded in cannot or are not returned to the buyer within 10 days after cancellation, the buyer may elect to recover an amount equal to the trade-in allowance stated in the contract. By written agreement, the buyer may agree to a later time for the delivery of goods and services. (1971, c. 796, s. 1; 1975, c. 805, s. 1.)

Editor's Note. — The 1975 amendment, beginning "or which complies with" at the end of effective July 1, 1975, added the language subsection (a).

§ 25A-40. Form of agreement or offer; statement of buyer's rights. — (a) In a home-solicitation sale the seller must present to the buyer and obtain his signature to a fully completed written agreement or offer to purchase which is in the same language as that principally used in the oral sales presentation and which designates as the date of the transaction the date on which the buyer actually signs and which contains the name and address of the seller, and which contains in immediate proximity to the space reserved for the signature of the buyer in bold face type of a minimum size of 10 points, a statement in substantially the following form:

"You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached Notice of Cancellation form for an explanation of this right."

(b) The seller must, in addition to furnishing the buyer with a copy of the contract or offer to purchase, furnish to the buyer at the time he signs the home-solicitation sale contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the contract and easily detachable, and which shall contain in 10 point bold face type the following information and statements in the same language as that used in the contract:

"Notice of Cancellation

(enter date of transaction)

.....
(date)

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

If you cancel, any property traded in, and payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram to

....., at
 (name of seller) (address of seller's place of business)
 not later than midnight of
 (date)

I hereby cancel this transaction.

.....
 (date)

.....
 (Buyer's Signature)"

(1971, c. 796, s. 1; 1975, c. 805, s. 2.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, rewrote this section.

§ 25A-41. Restoration of down payment; retention of goods. — (a) Except as provided in this section, within 10 business days after a home-solicitation sale has been canceled or an offer to purchase revoked in accordance with G.S. 25A-40, the seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness.

(b) If the down payment includes goods traded in, the goods must be tendered at the buyer's residence in substantially as good condition as when received by the seller. If the seller fails to tender the goods as provided by this section, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement.

(c) Repealed by Session Laws 1975, c. 805, s. 3, effective July 1, 1975.

(d) Until the seller has complied with the obligations imposed by this section, the buyer may retain possession of goods delivered to him by the seller and has a lien on the goods in his possession or control for any recovery to which he is entitled. (1971, c. 796, s. 1; 1975, c. 805, s. 3.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, inserted "business" near the beginning of subsection (a) and repealed subsection (c), which related to retention of cancellation fees by the seller.

§ 25A-42. Duties as to care and return of goods; no compensation for services prior to cancellation. — (a) Except as provided by the provisions on retention of goods by the buyer (G.S. 25A-41(d)), within a reasonable time after a home-solicitation sale has been canceled, the buyer must make available to the seller at the buyer's residence in substantially as good condition as received, any goods delivered under the contract or sale, or in the alternative, the buyer may comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. The seller shall within 10 business days of receipt of the buyer's notice of cancellation notify the buyer whether the seller intends to repossess or to abandon any shipped or delivered goods. If the buyer makes the goods available to the seller and the seller does not pick them up within 20 days of the date of the notice of cancellation, the buyer may retain or dispose of the goods without any further obligation. If the buyer fails to make the goods available to the seller, or agrees to return the goods to the seller and fails to do so, then the buyer shall remain liable for performance of all obligations under the contract.

(b) The buyer has the duty of a bailee to take reasonable care of the goods in his possession before cancellation or revocation and for a reasonable time thereafter, during which time the goods are otherwise at the seller's risk.

(c) If the seller has performed any services pursuant to a home-solicitation sale prior to its cancellation, the seller is entitled to no compensation therefor.

(d) The seller shall not negotiate, transfer, sell, or assign any note, contract, or other evidence of indebtedness arising out of a home-solicitation sale to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased. (1971, c. 796, s. 1; 1975, c. 805, s. 4.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, rewrote subsection (a), substituted "the duty" for "a duty" near the beginning of subsection (b), substituted

"therefor" for "except the cancellation fee provided in G.S. 25A-41(c)" at the end of subsection (c) and added subsection (d).

§ 25A-43. Unconscionability. — (a) With respect to a consumer credit sale, if the court finds the agreement or any clause of the agreement to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) If it is claimed or appears to the court that the agreement or any clause thereof may be unconscionable, all parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making its determination.

(c) As used in this section, "unconscionable" shall mean totally unreasonable under all of the circumstances. (1971, c. 796, s. 1.)

Quoted in *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976).

§ 25A-44. Remedies and penalties. — In addition to remedies hereinbefore provided, the following remedies shall apply to consumer credit sales:

- (1) In the event that a consumer credit sale contract requires the payment of a finance charge not more than two times in excess of that permitted by this Chapter, the seller or an assignee of the seller shall not be permitted to recover any finance charge under that contract and, in addition, the seller shall be liable to the buyer in an amount that is two times the amount of any finance charge that has been received by the seller, plus reasonable attorney's fees incurred by the buyer as determined by the court. However, if the requirement of an excess charge results from an accidental or good faith error, the seller shall be liable only for the amount by which the finance charge exceeds the rates permitted by this Chapter.
- (2) In the event that a consumer credit sale contract requires the payment of a finance charge more than two times that permitted by this Chapter, the contract shall be void. The buyer may, at his option, retain without any liability any goods delivered under such a contract and the seller or an assignee of the rights shall not be entitled to recover anything under such contract.
- (3) In the event the seller or an assignee of the seller (i) shall fail to make any rebate required by G.S. 25A-32 or G.S. 25A-36, (ii) shall charge and receive fees or charges in excess of those specifically authorized by this Chapter, or (iii) shall charge and receive sums not authorized by this Chapter, the buyer shall be entitled to demand and receive the rebate due and excessive or unauthorized charges. Ten days after receiving written request therefor, the seller shall be liable to the buyer for an amount equal to three times the sum of any rebate due and all improper charges which have not been rebated or refunded within the 10-day period.

- (4) The knowing and willful violation of any provision of this Chapter shall constitute an unfair trade practice under G.S. 75-1.1. (1971, c. 796, s. 1.)

Cited in State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

§ 25A-45. Conflict with Consumer Credit Protection Act. — In all cases of irreconcilable conflict between the provisions of this Chapter and the provisions of the Consumer Credit Protection Act, the provisions of the Consumer Credit Protection Act shall control. (1971, c. 796, s. 3.)

Cited in State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

Chapter 25B.

Credit.

Article 1.

Credit Rights of Women.

Sec.

- 25B-1. Equal availability of credit for women.
 25B-2. Responsibility of credit-reporting agency
 to maintain separate credit histories.

Sec.

- 25B-3. Right of action to enforce Article.
 25B-4. Granting of credit not otherwise
 affected.

ARTICLE 1.

Credit Rights of Women.

§ 25B-1. Equal availability of credit for women. — (a) No married woman shall be denied credit in her own name if her uncommingled earnings, separate property or other assets are such that a man possessing the same amount of uncommingled earnings, separate property or other assets would receive credit.

(b) No unmarried woman shall be denied credit in her own name if her property, earnings or other assets are such that a man possessing the same amount of property, earnings or other assets would receive credit.

(c) For the purposes of this section, "credit" means the obtaining of money, property, labor or services on a deferred-payment basis. (1973, c. 1394, s. 1.)

§ 25B-2. Responsibility of credit-reporting agency to maintain separate credit histories. — A credit-reporting agency shall, upon written request of a married person, identify within any report delivered by the agency, both the separate credit history of each spouse and the credit history of their joint accounts, if such information is on file with the credit-reporting agency. (1973, c. 1394, s. 2.)

§ 25B-3. Right of action to enforce Article. — (a) A married or unmarried woman denied credit in violation of this Chapter shall have a right of action on account of such violation in which she shall be entitled to actual damages, and reasonable attorney's fees in the discretion of the court to be taxed as part of the cost.

(b) Violations of this Chapter may be enjoined by action of the Attorney General brought in behalf of the State pursuant to authority granted in G.S. 114-2. (1973, c. 1394, s. 3.)

§ 25B-4. Granting of credit not otherwise affected. — Nothing contained herein shall be construed to deprive any credit grantor of his right to deny credit or limit its terms based upon its evaluation of the applicant's capability or willingness to repay, or to require any credit grantor to give preferential treatment to any applicant because of sex or marital status. (1973, c. 1394, s. 4.)

Chapter 26.

Suretyship.

Sec.	Sec.
26-1. Surety and principal distinguished in judgment and execution.	26-6. Dissenting surety not liable to surety on stay of execution.
26-3. Summary remedy of surety against principal.	

§ 26-1. Surety and principal distinguished in judgment and execution. — In the trial of actions upon contracts either of the defendants may show in evidence that he is surety, and if it be satisfactorily shown, the jury in their verdict, or the magistrate in his judgment, shall distinguish the principal and surety, which shall be endorsed on the execution by the clerk of superior court. (1826, c. 31, s. 1; R. C., c. 31, s. 124; Code, s. 2100; Rev., s. 2840; C. S., s. 3961; 1973, c. 108, s. 14.)

Editor's Note. — The 1973 amendment substituted "magistrate" for "justice of the peace" and "clerk of superior court" for "clerk or justice of the peace issuing it."

§ 26-3. Summary remedy of surety against principal. — Any person who may have paid money for and on account of those for whom he became surety, upon producing to the clerk of superior court, a receipt, and showing that an execution has issued, and he has satisfied the same, and making it appear by sufficient testimony that he has expended any sum of money as the surety of such person, may move the clerk for judgment against his principal for the amount which he has actually paid; a citation having previously issued against the principal to show cause why execution should not be awarded; and should the principal not show sufficient cause, the clerk shall award execution against the principal. (1797, c. 487, s. 1, P. R.; R. C., c. 110, s. 1; Code, s. 2093; Rev., s. 2842; C. S., s. 3963; 1973, c. 108, s. 15.)

I. GENERAL CONSIDERATION.

Editor's Note. —

The 1973 amendment inserted "clerk of" preceding "superior court" and deleted "or any justice of the peace having jurisdiction of the same" following "superior court" near the

beginning of the section, substituted "clerk" for "court or justice of the peace, as the case may be" near the middle of the section and for "court or justice" near the end of the section and made certain other minor changes in wording.

§ 26-6. Dissenting surety not liable to surety on stay of execution. — Whenever any judgment shall be obtained against a principal and his surety, and the principal debtor shall desire to stay the execution thereon, but the surety is unwilling that such stay shall be had, the surety may cause his dissent thereto to be entered by the judge or clerk, which shall absolve him from all liability to the surety who may stay the same. And the sheriff or other officer, who may have the collection of the debt, shall make the money out of the property of the principal debtor, and that of the surety for the stay of execution, if he can, before he shall sell the property of the surety before judgment. (1829, c. 6, ss. 1, 2; R. C., c. 110, s. 3; Code, s. 2095; Rev., s. 2845; C. S., s. 3966; 1973, c. 108, s. 16.)

Editor's Note. — The 1973 amendment deleted "before a justice" following "obtained" near the beginning of the first sentence, substituted "judge or clerk" for "justice" near the end of the first sentence and substituted "sheriff" for "constable" near the beginning of the second sentence.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 15, 1979

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1979 Supplement to the General Statutes of North Carolina was prepared and published by the Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN

Attorney General of North Carolina

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